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SPOUSAL CLAIMS AND THE SERVICEMAN'S DISCRETION: CHALLENGING DISTRIBUTIONS OF ACCUMULATED MILITARY PAY UNDER 10 U.S.C. 2771[1]

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I. INTRODUCTION

As the gates of North Vietnamese prison camps opened over a year ago and 566 American prisoners of war marched to freedom, the military began the painful task of accounting for the servicemen yet missing in the war's aftermath. In the emotion charged atmosphere that has surrounded both the search operations[2] and the resulting military death determinations issued under the federal Missing Persons Act[3], the issues arising from distribution of a serviceman's accumulated military earnings on his demise have virtually been neglected. Nonetheless, for a small but significant number of surviving spouses, the inequities which have been revealed in the course of such distributions represent the culmination of a series of unfounded hopes and unfulfilled dreams.

For the long years during which their husband's were absent, the spouses of prisoners of war (hereinafter PW) and missing in action (hereinafter MIA) subsisted on an alloted amount of their husband's military pay and allowances.[4] The remaining undistributed portion of the serviceman's compensation was deposited in federally created savings plans accruing 10 per cent interest[5] to be released upon the serviceman's return or upon military determination of his death. As the years of unresolved status passed, the fund appreciated to the extent that it constituted the major asset in the estate of these missing individuals. In those cases where status was ultimately resolved by death determinations, that substantial sum was released under a federal statutory ordering of priorities of distribution which provided;

> "In the settlement of the accounts of a deceased member of the armed forces . . . an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:
>
> (1) Beneficiary designated by him in writing to receive such an amount
> (2) Surviving spouse . . . ."[6]

Relegating the serviceman's spouse to secondary priority in this scheme of distribution is surprising, if only because of the primacy normally given her claims under dower or community property laws on in an intestate distribution.[7] In the context of this statute, however, deference to the serviceman's wishes apparently outweighed these other considerations. Moreover, since a married serviceman's designation would normally be in his wife's favor, this clash of policies would generally be obscured. In some situations, however, the very latitude of personal choice embodied in the statute governing distribution has operated to exclude a wife from her rightful inheritance. To illustrate, in one instance,[8] a sailor married shortly prior to deployment for Vietnam. At that time, his mother was designated as beneficiary of his arrearages of pay. Although the Commanding Officer of his unit was aware of the marriage, no attempt was made to ascertain whether the sailor desired to change the designation; and the sailor, in the confusion of marriage and forthcoming deployment, failed to amend the beneficiary. Shortly after his arrival in the combat zone, the husband disappeared and was classified MIA. During his lengthy unaccounted absence, his bride, oblivious to the procedures for determining a beneficiary of her husband's accumulated earnings,

failed to take any of the available actions to reduce the fund. Consequently, when a presumptive finding of death was issued by the Service Secretary, the mother rather than the wife recognized the benefits of the sailor's military service. Whether the failure to change the beneficiary could be ascribed to mere oversight, to the misconception that the fund involved would be insignificant, or to actual design is conjectural. For whatever reason, rigid application of the statute in that instance permitted a mother to reap a windfall at her daughter-in-law's expense.

While the protracted conflict which highlighted these statutory shortcomings is now a matter of history, the problems themselves cannot be treated as historical anachronisms. Thus, the difficulty is of continuing immediate concern for those spouses already affected by the provision as well as the wives of approximately 1200 servicemen still listed as missing,[9] some of whom will likewise feel the adverse impact of the act wihtout immediate remedial legislation or effective judicial recourse. In a broader sense, these flaws portend difficulties in any future armed strife in which this country becomes involved. And while the injustices stemming from section 2771 are most pronounced where pay accumulates as a result of a serviceman's prolonged absence, the problem cannot be relegated to insignificance in those more numerous cases where the fund is seemingly inconsequential. For even the composite of such insignificant deprivations alone would constitute a compelling case for reevaluation of the enactment.

The following article will trace the historical background of 10 U.S.C.

section 2771, concentrating on the clash between federal control and state prerogative over testamentary disposition of military earnings[10] which culminated in specific federal preemption accomplished by the 1955 amendment of the statute.[11] Thereafter, attention will be focused on various schemes or theories whereby a wife might reach her husband's accumulated earnings from which she was excluded.[12] Finally, the provision will be examined in the context of other previously accepted will substitutes to ascertain its propriety as a testamentary disposition of property.

II. HISTORICAL ROOTS OF THE 1955 AMENDMENT

Governmental solicitude for American servicemen has, in the past, been reflected in a panoply of federal and state legislation ranging from the federal Missing Persons Act[13] and the Soldiers and Sailors Civil Relief Act[14] to state laws facilitating appointment of conservators,[15] granting tax relief[16] and liberalizing rules governing the efficacy of powers of attorney,[17] all directed at minimizing the legal problems of soldiers and sailors traceable to the exigencies of military life.[18] The high risk nature of the profession has engendered particular legislative attention in the realm of testamentary distributions and post-death benefits provided the kin of a deceased serviceman.[19] In that same spirit, the federal government has acted to clarify procedures for prompt distribution of arrearages of military pay upon determination of a serviceman's demise. These federal provisions, including the scheme for distribution of accumulated military earnings, have had the practical effect of permitting a serviceman to circumvent state

statutes governing formalities of will execution and probate of a decedent's estate.[20] Federal encroachments on this jealously guarded area of state prerogative, testamentary dispositions, have encountered careful scrutiny and often vigorous opposition.[21] For while states, after some degree of initial resistance,[22] have permitted other will substitutes which remove assets from probate jurisdiction,[23] they have, through various devices,[24] challenged the power of the federal government to invade this state domain by controlling disposition of a serviceman's unpaid pay and allowances.

A. State Challenges to Federal Encroachment

Prior to the 1955 amendment which permitted a serviceman for the first time to designate personally the beneficiary of his unpaid pay, that sum was distributed under a system which gave the decedent's representative first claim to the assets.[25] Because the executor thereafter distributed the funds in accordance with the decedent's will or pursuant to intestate succession, the federal provision could be interpreted as wholly consistent with continued state control over testamentary disposition of this sum. Thus, in the context of the earlier enactment, a series of cases had been decided which refuted the theory of federal preemption of this area of state concern.[26] Directing attention to the statutory priorities, courts stressed that the federal system was superimposed upon state controls of testamentary distribution rather than supplanting those statutory directives.[27] Drawing support from the Tenth amendment's reservation of unenumerated powers for the state, tribunals stressed that federal invasion of this state prerogative

was not only unintended but unconstitutional.[28] Thus, courts noted that the enactment's purpose was to facilitate distribution of funds rather than to make determinations of rights of succession, a function reserved to the states.

Of the series of post-World War II decisions adjudicating rights to a serviceman's unpaid pay and allowances? Stone's Estate[29] was typical in its interpretation of federal provisions in a manner consistent with continued state supremacy over testamentary distributions. In that case, the court responded to the defendant's contention that federal legislation controlling distribution of accumulated earnings necessarily precluded the state from levying state inheritance taxes and noted:

> "Congress intended by the passage of the act to facilitate the settlement of the accounts of a member of the Army who had died . . . [In order to make certain that the accounts were settled as quickly as possible they provided a method which was uncomplicated and certain.]
>
> "Congress did not intend, by providing for the payment of the funds accrued to the credit of a deceased soldier to his duly appointed legal representative, to effect a transfer of funds contrary to the established law of the several States. The very fact that the act directs payment to the duly appointed legal representative is an expression of intent...The administrator is only a conduit through whose agency the actual transfer of funds is to be made in accordance with the provision of the laws of the respective States which effect the transfer."[30]

This reasoning, imbued with concepts of federalism and states' rights incorporated in the Tenth Amendment, became the bulwark of a state's defense against federal encroachment in the area of testamentary distribution of a serviceman's unpaid pay and allowances.

In marked contrast with the series of opinions which disavowed federal preemption, Keown v. United States,[31] decided by the Eighth Circuit in 1951, appears to have foreshadowed the 1955 amendment by recognizing absolute federal control over this particular asset. The case involved an attempt by the estate's representative to recoup amounts paid by the government to a third party while the representative was still attempting to qualify. The court, citing as a statutory purpose the prompt disposition of assets to prevent family hardship, repudiated[32] the argument that a representative must be allowed reasonable time in which to qualify before distribution of the funds. Thereafter, attention was turned to the question of federal control of this testamentary disposition, and the court observed:

> "But the difficulty in the present situation is that the funds involved did not constitute a part of the decedent's estate for purposes of administration, except as Congress had allowed them to become such. And Congress did not allow them to become part of the decedent's administrable estate from the fact that a duly appointed legal representative existed and had made demand, before the money had otherwise been paid out."[33]

While this interpretation was subsequently attacked in Howell v. United States,[34] it was acquitted when Congress reconsidered and restructured the enactment in 1955.

B. Federal Preemption of State Testamentary Control

Both the amended text of section 2771 and the underlying legislative history evince a congressional intent to resolve the federal-state impasse, reflected in a series of judicial opinions refuting federal preemption, by permitting the serviceman to designate personally the beneficiary of his

accumulated pay, thereby removing this one asset from state testamentary control.[35] Such action was consonant with decisions dating to earliest constitutional history which upheld federal preemption in diverse areas in the face of strong state entrenchment behind the Tenth Amendment.[36] But the Tenth Amendment, upon which states have relied to blunt federal control of testamentary distributions, traces a very indistinct line between federal concerns and state prerogatives. Thus, in an era of expanding federal involvement in virtually every aspect of life, the barrier erected by the amendment has been virtually illusory. Empowered to control not only those areas specifically enumerated in the Constitution, but also to enact legislation deemed "necessary and proper"[37] to the exercise of any function constitutionally enumerated, Congressional power is seemingly plenary.

Even the field of testamentary dispositions, so long considered a bastion of state prerogative, has likewise not been immune from federal incursions. The federal assault on state control of testamentary distributions which culminated in the 1955 amendment was initially manifest in federal statutes providing death benefits under the Railroad Retirement Act,[38] payment of National Serviceman's Life Insurance proceeds,[39] rights of survivorship in United States Savings Bonds[40] and distribution of accumulated earnings of other federal employees.[41] In each instance, federal encroachment into the domain of state testamentary control encountered local opposition. Nonetheless, the incursions were ultimately sustained by the federal judiciary.[42] Consistent with these earlier enactments and decisions, Congress legislating

for the welfare of the American fighting man,[43] again violated that ill-defined border established by the Tenth Amendment by removing a deceased serviceman's unpaid pay and allowances from state testamentary authority.

The proliferation of federal employees necessitated by an ever expanding bureaucracy, mandated establishment of death benefits for these employees. In response to this clear need, a series of measures was enacted which, in providing federal death benefits and in establishing priorities of distribution, clashed with state testamentary schemes. The Railroad Retirement Act of 1937[44] represented an early attempt to provide specific death benefits. Like section 2771, it permitted the employee to designate the beneficiary of a lump sum settlement paid at the time of his death. Subsequent judicial interpretation of the enactment has validated its obvious testamentary purpose over state opposition.[45] In a 1940 enactment which ultimately served as a pattern for the 1955 amendment of section 2771,[46] Congress duplicated the provisions of the Railroad Retirement Act by permitting other federal employees to select the beneficiary of their accumulated earnings.

In 1950, the Supreme Court, ruling in Wissner v. Wissner,[47] determined that a federal statute, patterned after the two previously mentioned enactments in permitting designation of a beneficiary of National Serviceman's Life Insurance (NSLI) proceeds, preempted contrary state laws of community property. Although the wife, who petitioned for a proportionate share of the insurance proceeds, correctly noted that the proceeds of an insurance policy purchased with community assets constituted community property in

California,[48] the court, nonethless, found a valid exercise of Congressional power to provide for the serviceman's welfare, validated the statute and held it preemptive of contrary state law. In much the same light, the Supreme Court, some twelve years later, found federal regulations governing rights of survivorship in savings bonds controlling over inconsistent state community property standards.[49] The court, in that case, noted:

> "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the framers of our Constitution provided that the federal law must prevail . . . This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[50]

If the wording and history of section 2771 leave little doubt as to its intended impact, the judicial approval afforded the foregoing federal testamentary distributions leave even less regarding Congressional authority to enact such a statute. The right of Congress to control the distribution of a serviceman's accumulated military earnings, like its authority to control the availability of benefits under National Serviceman's Life Insurance policies, is inherent in its constitutional prerogative to raise and support an armed force.[51] Accepting the rationale of the Wissner court that a provision regulating NSLI beneficiary selection facilitates the raising of an army, there can be no serious question that a like scheme controlling disposition of accumulated earnings would be similarly justified. Thus, Congressional edict, coupled with judicial interpretation, has effectively foreclosed the assertion either of lack of intent or absence of authority as successful challenges to the amended provision. Hence, distribution of a deceased service-

man's accumulated pay and allowances is now controlled by federal statute rather than state enactment.

C. Impact of the Amended Provision

That no reported case has directly challenged the inequities that could result from application of the amended statute is primarily a reflection of two distinct factors. First, during peacetime, when soldiers are paid on a regular basis, the amount of which a spouse would be deprived would be rather inconsequential. Thus, there would be no strong motivation to endure the financial burdens and emotional stresses of protracted litigation where the end rewards would be so insignificant. While this would explain the dearth of challenge for the decade following the statute's amendment, it would not necessarily account for similar inaction during the course of the Vietnam conflict. Naturally, for most servicemen killed in Vietnam, the problems that could arise under section 2771 would be no more highlighted than in time of peace because of the negligible fund involved. For the wives of those servicemen whose death was established only after a prolonged period during which the serviceman was designated as missing in action or a prisoner of war, the situation would be altogether different. But even in these instances, where inequities would be compounded by the size of the fund involved, there would be no cause to pursue judicial remedies until a determination of death was made and distribution of the fund was imminent. Because the status of the great majority of MIAs and PWs has only recently been or remains to be resolved,[52] inaction during the course of the conflict, in retrospect, is

understandable.

In a real sense, the Federal Missing Persons Act,[53] under the authority of which status determinations and federal death declarations were made, provided fertile ground for the surfacing of injustices which have arisen under section 2771. That enactment governs status determinations of missing military members, mandates periodic reviews of designations and provides that a serviceman should be declared dead unless he can reasonably be presumed alive after consideration of the "information received or other circumstances." The statute reposes substantial discretion in the service secretaries and does not establish specific administrative procedures to be followed, evidentiary rules to be applied or standards of proof to be imposed in reaching a determination.[54] The absence of more specific statutory guidelines[55] has recently subjected the act to constitutional attack under the so-called "void for vagueness" doctrine.[56] This selfsame lack of specificity also permitted the service secretaries substantial latitude in exercising their predilection toward caution in declaring missing personnel killed in action. Whether the result of a small number of errors in designation[57] or out of some degree of natural reticence to write off a serviceman, the services declared many servicemen MIA under circumstances where the hope for survival was minimal if not nonexistent. In the majority of instances, initial classification as MIA or PW was unaltered by periodic review because of the dearth of new information that would permit redesignation. Hence, missing personnel remained in this state of limbo for years[58] while their pay and allowances were regularly credited

to their account.

More than any other factor, this lengthy period of unresolved status, permitting accumulated earnings to swell beyond expectation,[59] underscored the difficulties and injustices traceable to section 2771. For, although wives were allotted a percentage of their husband's monthly income, the unalloted portion stood beyong their control and was deposited in Uniformed Services Savings Deposit Plan accounts drawing ten percent interest.[60] While the applicable statutes and regulations were drafted with a degree of flexibility which would permit wives to act affirmatively to petition for an increased allotment[61] or, alternatively, for release of funds in the USSDP account,[62] neither option would be wholly satisfactory. Assuming, for the moment, that a wife was even aware of the general provisions governing distribution of her husband's accumulated earnings or of the fact that she had not been designated beneficiary to the point that she would seek methods to reduce the fund, such a petition would be accompanied by the forfeiture of a highly lucrative interest rate. Further, secretarial acquiescence in the petition would, by no means, be automatic. Indeed, the service secretaries, whose primary purpose must be viewed in this regard as the conservation of a serviceman's assets, would be highly reluctant to release funds without some fairly compelling justification or need.[63] Naturally, for those wives oblivious to the potential problems, even these remedies would be unavailing. Hence, while the 1955 revision was drafted to resolve problems and uncertainties arising under the former enactment, its application during the Vietnam War has spawned

inequities seemingly graver than those arising under the predecessor provision.

III. Potential Modes of Recourse

Historically, the attack on federal enactments controlling the distribution of a serviceman's unpaid pay and allowances have focused on the traditional state prerogative over testamentary dispositions to forestall federal encroachment.[64] Such arguments, if still viable, would permit widows of servicemen killed during the Vietnam conflict to challenge successfully the federally mandated scheme of distribution by interposing state laws of intestate succession. The explicitness of the 1955 amendment, viewed in the context of its legislative history, effectively forecloses this mode of recourse.[65]

Even in the face of this clear federal control, however, several approaches suggest themselves as viable and potentially successful methods of challenging distribution to the designated beneficiary. Thus, in those instances where a serviceman's intent to amend the designated beneficiary can be clearly established, judicial and administrative forums, following precedents in related areas, would arguably disregard noncompliance with the strict formalities of beneficiary amendments and recognize the intent.[66] Such a judicial or administrative amendment would be unwarranted where the serviceman's intent could not be clearly ascertained. Even in that situation, however, the fund would not be immune from a spouse's claim founded on state laws governing dower, forced shares or community property.[67] The two aforementioned theories, while potentially the most successful, do not exhaust the

alternatives for challenging the federal procedure for distribution. By pursuing a remedy under the Federal Tort Claims Act[68] or by attempting to reach the interest that had accumulated in the USSDP account itself,[69] contending that it is not subject to federal disposition, a serviceman's wife could possibly recognize at least a partial recovery. But these latter alternatives, on close inspection, are generally unsatisfactory. Thus, while the following discussion will carefully scrutinize the first two suggested modes of recourse, the latter options will be treated with brevity to underscore the disadvantages inherent in and potentially fatal to each.

A. Giving Effect To Intent: Judicial and Administrative Amendment of Beneficiary Designations

Regulatory guidelines of the responsive services recognize the serviceman's absolute right to amend the beneficiary designated to receive his accumulated pay and allowances upon his demise.[70] This right is conditioned, however, on compliance with certain delineated formal requirements.[71] Stringently applied, these prerequisites would deny recognition of intended beneficiary changes. This result would likewise apply in those situations where clearly expressed intent was coupled with sincere but unsuccessful efforts to comply fully with formal requirements. Gauged by the 1955 amendment of 10 U.S.C. section 2771, the major purpose of which was to ascertain and effectuate a serviceman's intent,[72] such an outcome appears directly contrary to the clear statutory intent.

While the issue of efficacy of intended beneficiary changes has not yet

been litigated in the context of distribution of accumulated military pay and allowances, it has often been deliberated in the areas of commercial insurance,[73] serviceman's life insurance,[74] public pensions and retirement benefits.[75] In those allied areas, courts, stressing that the purpose of formalities of amendment is as much to provide a convenient method of ascertaining the desire of an insured as to protect against double recovery,[76] have brushed aside regulatory technicalities to give effect to a clear manifestation of intent.[77] Thus, courts have held that strict compliance with Veterans Administration regulations governing changes of beneficiary of National Serviceman's Life Insurance is not necessary to effect an amendment.[78] A similar approach has been taken with insurance policies issued under the Federal Employees' Group Life Insurance Act;[79] and this interpretation has also prevailed where beneficiaries of pension or retirement funds were changed.[80] Since the underlying purpose of 10 U.S.C., section 2771 is to insure that the serviceman's accumulated earnings are distributed according to his wishes, there is no cause to believe that the same standard should not or would not apply to give effect to intent where clearly established. To hold to the contrary would "enthrone formality over frustrated intent."[81]

1. The "Affirmative Act" Requirement

Stressing that strict enforcement of formal requirements of beneficiary changes was merely intended as a tool to ascertain intent rather than as an end in itself, one court, construing a change of beneficiary under a National Service Life Insurance policy, summarized the rationale most often applied in

disregarding technical requirements:

> "All that is necessary is that the real wish and purpose of the soldier, who exposed his life in the Army for the safety of the government should sufficiently appear."[82]

While this concisely stated rule would appear to foster the more equitable result, it accomplishes that goal only at the sacrifice of uncomplicated judicial application under the former technical rules. Because individuals are frequently careless in conversation and informal writings, judicial ascertainment of a matter as elusive as subjective intent, without the crutch of strict formal requirements, is problematic. Thus, while a small number of tribunals have been content to divine intent from verbal and written expressions alone,[83] most have sought some further objective manifestation reflecting the expressed intent. This latter approach, requiring both an expression of intent and an act evincing that expressed intent, had its genesis in the field of commericial insurance.[84] In that sphere, it evolved from a general rule of evidence, designed to assist the determination of intent, to a strict formal requirement of a beneficiary amendment. This so-called "affirmative act" requirement likewise gradually gained ascendancy in the field of military insurance benefits.[85] In that context, the "affirmative act" rule became firmly entrenched in 1944 when Bradley v. United States[86] was decided. Bradley found that a failure to forward the completed form requesting a change of beneficiary to the responsible authorities might indicate either a lack of serious desire or an abandonment of purpose.[87] In its holding the court refused to carry out even a clearly expressed intent without some sufficient affirmative act directed at amending

the beneficiary. Thus, in a sense, Bradley and its immediate predecessors, although outwardly disavowing the harshness of a rule requiring strict compliance with formalities of amendment, mark, at least in spirit, a return to the former restrictive interpretations.

Although there is a fairly clear consensus that an "affirmative act" of some type is required to support a beneficiary change,[88] the interpretations given that requirement permit one court, determined to uphold a change, to give the rule a more expansive reading while,[89] at the same time allowing another forum a more narrow construction to deny an amendment. Thus, some courts have interpreted the rule to require an act believed by the decedent sufficient to accomplish the change.[90] Others have held the standard to require the completion of all but simple ministerial acts accompanying amendment.[91] Finally, a number of jurisdictions have construed Bradley to dictate the execution of some type of written document.[92] This diversity of precedent clouds the meaning and scope of the "affirmative act" requirement as it applies to the amendment of beneficiary of a servicemen's accumulated earnings. Even a liberal construction of the requirement, however, might impose substantial evidentiary burdens on the wife of a serviceman seeking a beneficiary change. Thus, of even greater importance than the discrepant interpretations of the rule are a series of factors, related hereafter, which challenge the very application of the "affirmative act" rule to dispositions under section 2771.

2. The Inapplicability of the Affirmative Act Rule

Where a serviceman has manifested a clear intent to change the beneficiary of his unpaid pay and allowances, that intent should not be defeated

by elevating the "affirmative act" concept from a mere "rule of evidence" to a strict substantive prerequisite of reformation.[93] This conclusion is bolstered by cases adjudicating beneficiary changes under the War Risk Insurance Act of 1917,[94] by treatment of this requirement in the context of pension and retirement funds[95] and even by the judicial expansion of the doctrine in a military context.[96] These considerations compel a conclusion that the "affirmative act" requirement should constitute but one analytical tool for determining a serviceman's intent.

The imposition of the "affirmative act" rule reflects an underlying judicial caution in ascertaining intent and in altering the status quo. This same hesitancy was not always reflected in holdings under the War Risk Insurance Act of 1917,[97] the predecessor of current servicemen's insurance provisions. Rather, a series of cases decided under the former enactment refused to permit the determination of intent to be controlled solely by "form, formality and legal technicality." Thus, amendments were upheld in Morgan v. United States,[98] Steele v. Suwalski,[99] and Claffy v. Forbes,[100] on the basis of letters alone which expressed an intent to alter the beneficiary. In none of the cases were the formal requirements for a change even arguably complied with. And while each decision found significant the act of writing a letter, it is clear that this factor was not considered solely to establish an "affirmative act" but rather as but one element establishing the serviceman's true intent.[101] Although the rule of these earlier decisions which treated the "affirmative act" requirement more as an evidentiary guide than a substantive requirement

was subsequently abrogated in Bradley v. United States, it has continued to bear sway in the field of amendment of pension and retirement benefits and has also arguably been reintroduced in military insurance cases through the expansive definition given the requirement by recent decisions.

Like amendment procedures in the military, changes of beneficiary of civilian pension and retirement funds are governed by relatively strict formal requirements. While some courts have continued to apply the strict "affirmative act" standards governing commerical insurance amendments in this area,[102] other forums have abandoned formal requirements to give effect to clear expressions of intent.[103] Thus, Lyles v. Teachers' Retirement Board,[104] sustained a change solely on the basis of an inconsistent testamentary disposition. Watenpaugh v. State Teachers' Retirement System,[105] permitted an amendment on the basis of a completed beneficiary change form which had not been forwarded to the State Retirement Office. Repeated expressions of intent to change a beneficiary supported an amendment in Gallagher v. State Teachers' Retirement System.[106] Although each of the cases recognized and even outwardly attempted to apply the "affirmative act" rule, it is evident that the search for such an act was relegated to only one of the evidentiary matters establishing intent.[107]

In much the same vein, courts, adjudicating changes of beneficiary of military insurance, have outwardly continued to pay homage to the "affirmative act" rule while actually expanding the test to uphold any change where intent has been established to the court's satisfaction. Thus, in one instance, a

change was upheld on the basis of a single letter to a wife indicating that the husband had taken the necessary steps to change the beneficiary from the mother to the wife. Based on the exigencies of a battle environment and on the possibility that the actual beneficiary change form, which was never located, had been lost in the mail, the amendment was sustained.[108] Changes have likewise been upheld on authority of a designation of a beneficiary of the death gratuity,[109] on a Record of Emergency Data designation[110] on a Personal Affairs Questionnaire[111] on a letter to the Veterans Administration[112] requesting a beneficiary change and on a holographic will.[113] While most courts have continued to speak in terms of "affirmative acts", the foregoing decisions reflect that this prerequisite has been flexibly applied to permit changes where deemed appropriate by the court. As such, the decisions agrubly mark a return to pre-Bradley precedent in treating affirmative acts as but one of several indices of intent.

Those cases decided under the War Risk Insurance Act of 1917, as well as the aforementioned cases of more recent vintage which claimed to apply the "affirmative act" rule, illustrate the difficulty of applying the Bradley standard to beneficiary changes in the military. The peculiarities and exigencies of military life make strict application of that requirement particularly inappropriate.[114] Few soldiers have either the time or training to "master procedural niceties" necessary to effectuate a beneficiary change.[115] While the "affirmative act" rule does validate some unsuccessful efforts to change a beneficiary, it potentially punishes the unsophisticated serviceman

and frustrates his true intent. When confronted by the morass of paper work and instructions commonly encountered by a new serviceman, directions regarding the basics of SGLI coverage or distribution of unpaid pay and allowances, let along the formal intricacies of a beneficiary change, are rarely noted and more rarely remembered.

The primary purpose of a court of law in this realm should be to give effect to the manifest intent of a serviceman who has sacrificed his life for his country. Where mechanistic application of the "affirmative act" requirement defeats an otherwise clearly expressed intent to change a beneficiary, it has become a tool to thwart rather than to ascertain intent. While only a small number of spouses would be able to satisfy the strict requirements of the "affirmative act" rule and successfully secure a judicial amendment of the beneficiary of their husband's accumulated military earnings, the potential of this form of recourse would be greatly enchanced if the rule of Bradley v. United States is repudiated in this context.

3. Administrative Correction of Inaccurate Designations

Administrative, as well as judicial, recourse is available to a spouse excluded from receiving her husband's accumulated military earnings to amend the beneficiary designation to conform with the serviceman's true intent. An administrative body[116] in each of the services is assigned the responsibility of modifying, amending or updating a serviceman's military records to "correct an error or remove an injustice" affecting the service member.[117] While these administrative boards are primarily concerned with the review of the quality of a serviceman's discharge,[118] they have also considered petitions for promo-

tion,[119] for return of funds for a widow's annuity,[120] for correction of officer evaluations,[121] and for disability benefits[122] in an attempt to correct errors and injustices. Given this broad range of concern, there appears to be no sound reason for a Board refusing to consider the error and resultant injustice of an unintended beneficiary designation incorporated as a part of every serviceman's official record.

The requirement that each petition to the Board be designed to correct an error affecting the service member rather than his dependents is a potential stumbling block for a wife seeking administrative amendment of a beneficiary. For while a wife has a recognized right to petition in behalf of her deceased husband,[123] it might be argued that the sole purpose of her claim was to correct an error affecting the wife alone. But failure to give effect to a serviceman's true choice of beneficiary may work an injustice against the serviceman as much as against the true object of his beneficence. Hence, a surviving spouse, though personally recognizing a benefit from a successful petition, would be seeking to rectify an injustice against her husband occasioned by disregard of his actual intent.

Like a judicial action to amend a beneficiary designation, the wife, as the petitioning party, would carry the burden of establishing an error in her spouse's record to prevail in a Board action.[124] Hence, the requirement of proving intent could not be circumvented simply by pursuing an administrative rather than judicial remedy. Nonetheless, in establishing that intent to amend the beneficiary, the former course of action could well prove

preferable. Since the harsh "affirmative act" rule developed in Bradley v. United States has apparently not yet been adopted by administrative Boards, the wife's burden of proving her husband's intent should be facilitated before an administrative Board.[125]

B. Recourse Through Dower, Forced Share and Community Property Rights

For centuries, courts have recognized a wife's inchoate right to a certain portion of her husband's estate[126] to insure her a degree of financial stability, thereby avoiding a potential burden on the resources of the state. This right, embodied in common law dower, statutory forced share or community property systems qualifies a husband's otherwise unlimited power of testamentary disposition and permits a wife to claim as her own a specific portion of her husband's estate, regardless of her spouse's intended scheme of distribution. Such provisions would seemingly allow a serviceman's wife to disregard her husband's designation of beneficiary of his unpaid pay and allowances and lay claim to a portion of his estate.

The historical background of and Congressional deliberation over the 1955 amendment of section 2771, both reflecting a clearly intended federal invasion of state testamentary control, dictate the greatest caution in pursuing the aforementioned remedy founded almost entirely on state law. But a recognition of federal prerogative regarding the testamentary disposition of a serviceman's estate does not necessarily imply an invalidation of all state testamentary rules affecting, directly or indirectly, that sum. Hence, only if application of a particular state law is clearly inconsistent with the purposes and

apparent scope of the federal enactment, would it be determined to be pre-empted.[127] The significant question then is whether state laws of dower, forced shares and community property which underlie this potential remedy are to be read as inconsistent with federal control over the distribution of a serviceman's military pay upon his death.

Of the three existing schemes assuring the inheritance rights of the surviving spouse, community property laws have most often been scrutinized by federal courts to ascertain their consistency or conflict with federal statutes.[128] Although community property standards have occasionally been interpreted in a manner consistent with federal enactments,[129] the Supreme Court, in two cases considering statutes or administrative regulations most closely resembling section 2771, Wissner v. Wissner, and Free v. Bland, squarely rejected state community property standards.

In Wissner v. Wissner, the decedent, a member of the Army, amended the beneficiary of his Serviceman's Group Life Insurance to his mother after he and his wife became estranged. His wife challenged distribution of the proceeds to the mother, correctly arguing that prevailing California law earmarked the insurance as a community asset because it was purchased with community funds.[130] Avoiding the significant issues of whether California could classify any Army pay as community property[131] or whether the spouse could recover one-half of the amount of the premiums paid rather than a like amount of the proceeds,[132] the Court, dividing 5 to 3, found that application of community property standards would not only frustrate the clear Congressional intent to

enhance morale of the fighting man by giving him absolute discretion to select his beneficiary,[133] but would likewise offend statutory provisions exempting this fund from the claims of creditors.[134] The majority, while recognizing that similar claims had been permitted against federally controlled and statutorily exempted funds to satisfy valid judicial support or alimony decrees,[135] refused to extend the exceptions to encompass claims arising from community property standards alone.[136] In so concluding, the court found judicial recogniation of a specific need far more compelling than the general concept of necessity incorporated in community property statutes.[137]

The dissent, characterizing the wife's claim as that of co-owner rather than a creditor,[138] divined no congressional intent to obliterate family property rights traditionally defined by the state. Instead, Justice Minton, writing for the minority, indicated that "it was the fund Congress was interested in protecting, not the beneficiary."[139]

Approximately twelve years after Wissner was decided, the Supreme Court was again called on to determine whether Treasury Regulations governing rights of survivorship in United States Saving Bonds preempted inconsistent Texas community property standards which were asserted by the petitioner, the surviving son and beneficiary of his mother's will, to defeat the father's right of survivorship.[140] Refuting an argument that the federal procedure was designed as a convenient method for payment of proceeds rather than to confer an actual right of survivorship, the court found that this congressional exercise of its power to borrow money was inconsistent with and intentionally preemptive of state laws.[141]

On first inspection, the standards distilled from Free and, more particularly, from Wissner would appear to compel a like conclusion of federal preemption in the context of section 2771.[142] For whereas there is no comparable statutory protection from the claims of creditors attaching to the funds disbursed under section 2771, this distinction is relegated to insignificance by the strong expression of Congressional intent deemed compelling in Wissner[143] and also strikingly encountered in the history of section 2771. Further, while the precedential value of the two decisions must be tempered by the impact of passing time on both the composition of the Court and prevailing legal interpretations,[144] the impact of these changes is too conjectural to rely on in avoiding the precedent of Wissner and Free. More significant, however, than changes in Court personel, in gauging the precedential value of the two decisions, are certain factual distinctions between the two cases and a section 2771 distribution. Only in the realm of section 2771 distributions, where a wife would be deprived of the major portion of her husband's estate under the federal standard,[145] would the extent of spousal need and the degree of deprivation be focused to its sharpest for judicial consideration. While the Supreme Court in Wissner specifically rejected relative need as a compelling factor in the equation,[146] pertinent distinctions between that case and Free v. Bland, coupled with observations by the Wissner majority itself, stress that a wife's need can become significant and even dictate a different result in the appropriate context.

The three dissenting justices in Wissner noted that recognition of

federal preemption would offend the sanctity of family property rights governed by state law[147] and, on that basis, took exception with the majority's position. Since essentially the same objection could have been raised in Free v. Bland, decided twelve years subsequently, the unanimity of the Court, on first reflection, is surprising.[148] Of course, the shift could conceivably be explained by a change in the Court's personnel. On closer inspection, however, a subtle factual variation appears which both exposes the underlying concern of the Wissner dissenters and accounts for the alignment in Free. Unlike Wissner, the determination of federal preemption in Free did not deprive a wife of her share of a community asset. Rather, a nephew was thereby precluded from inheriting his aunt's community property interest. Hence, unlike Wissner, Free concealed the spousal need elements of community property which impelled the Wissner dissenters to defend state control of family property rights. Thus, the divisive impact of spousal need in the Wissner decision is accentuated rather than obliterated by Free.

While the factual differences between the two cases impede interpretation of the unanimity of the Free holding as a wholesale abandonment of considerations of spousal need, reflected in the dissenting opinion in Wissner, the decision likewise cannot be cited as a refutation of the majority position in that case. The fact remains that five justices united behind a position expressly rejecting the need of a wife as a significant factor for consideration. Assessing the depth of the majority's commitment to its position, it is relevant to consider the holding's financial impact on the surviving spouse. Rejection of the wife's argument in Wissner deprived her of insurance proceeds

amounting to no more than a fraction of her husband's estate. By contrast, however, denial of a POW/MIA wife's claim in the context of a section 2771 distribution would preclude her from enjoying the majority of her spouse's assets. Thus, by comparison, the issues of spousal need and relative deprivation are much more sharply focused in the realm of distribution of military earnings. Whether this distinction alone would impell the Wissner majority to reconsider its holding is the significant consideration.

The language of the Wissner Court would appear to indicate that spousal need, no matter the degree, is insignificant.[149] However, the decision's explicit recognition of the continued viability of alimony and support exceptions to total federal control,[150] its failure to address the characterization of federal wages as community property,[151] and its reference to possible recoupment of premium payments[152] reflect possible gaps in the Court's position on spousal need. Arguably, it is this apparent unwillingness to reject unequivocally spousal need, reflected in the aforementioned observations, which would permit a court to disregard Wissner in the face of the substantial financial deprivation possible under section 2771.

Acquiescing in a series of federal decisions that had permitted wives to attach federal funds specifically exempted from creditor's claims to satisfy alimony and support obligations, the Wissner Court arguably recognized need, where judicially established, as a significant criterion. Stressing the exception was warranted only because of the reliability attaching to a judicial

determination of need,[153] the majority intentionally refrained from extending the exception to permit other proofs of financial dependence. While this mechanical approach has the practical value of easy application in permitting a court to evade the difficult task of measuring the extent of need, it accomplishes this at the sacrifice of a wife's right of support.

Responding to the rationale of the majority, the dissenting justices in Wissner noted the indefensibility of the majority's distinction between methods of ascertaining need.[154] Indeed, inspection of the federal holdings followed by and embodied in the judicial decree exception of Wissner lends credence to the dissent's attack. For while each of those decisions permitted a wife, armed with a judicial support or alimony decree, to attach federal assets, the need of the wife rather than the judicial establishment of that need was held to warrant the court's action. Thus, the Circuit Court, in In re Gardianship of Bagnall,[155] stressing the strong policy of providing dependents with financial security, permitted a wife to reach her husband's federal disability compensation, statutorily exempted from the claims of creditors, to satisfy an alimony obligation. The decision noted:[156]

> "The purpose of the exemption statue in that case and the purpose of the exemptions in this were to protect not only the recipient of the benefits but to afford some degree of security to the family and dependents of such recipient. The enactment of these statutes had as their purpose, at least in part, to insure the public against the pauperism of the recipients of the benefits or that of his dependents."

Other decisions consistently highlight the general support obligations rather than the judicial establishment of those duties as the major factor justifying

attachment of federal funds.[157]

Wissner's requirement of an actual alimony or support decree is consistent with its characterization of community property as primarily a joint money-making operation,[158] undeserving of the same judicial solicitude afforded a court's decree of alimony or support. Certainly the historical course alone of community property and dower systems and their progeny do not support this description. These systems have been founded on a recognition of the financial needs of the surviving widow. Thus, from earliest times, a husband's gratuitous transfers[159] and other fraudulent dispositions[160] of property, designed to deprive his spouse of necessary support, have been subject to challenge by his wife to protect her financial security.[161] By the same token, courts have disregarded otherwise valid antenuptial agreements when designed to disregard the husband's support obligations.[162] By relegating this traditionally central function to secondary import, Wissner has disregarded the historical foundations of dower and community property.

In a real sense then, judicial alimony and support decrees are but one manifestation of a broader underlying policy of insuring a wife's financial well being. So viewed, attempts by the Wissner Court to attach significance to the judicial declaration alone are misplaced. Further, the very act of recognizing these alimony and support cases creates a degree of uncertainty regarding the Court's rejection of need as a significant consideration.

Justice Clark, penning the majority opinion in Wissner, left open two avenues of retreat from the Court's strong stance regarding the insignifi-

cance of need. First, he noted that the Court was intentionally refraining from addressing the broader question of exemption of all military income from characterization as community property. Next, he recognized, by strong implication, the spouse's right to recoup from her husband's estate a portion of the premiums paid from community funds. While these observations, on first inspection, appear to have only the slightest impact on the scope of the Wissner holding, each reflects the majority's unwillingness to unequivocally reject the need criterion and thus arguably permits deviation from the holding where that consideration is sufficiently compelling.

The reference to, but lack of resolution of, the characterization of military wages is highly significant in ascertaining the impact of Wissner on a 2771 distribution. Had the majority addressed the broader issue, it is conceivable that it would have been far less readily inclined to accept Congressional intent, if, indeed, it could be ascertained, as dispositive of the issue where its recognition would deprive a wife, not merely of insurance proceeds but, in essence, the major part of her spouse's estate. Indeed, such a holding would cause the status of spousal support laws to regress to its earliest feudal beginnings for a significant sector of our society if community property and dower laws were wholly disregarded. The failure of the Court to address this issue permits the inference to be drawn that so flagrant an evasion of spousal support obligations could not be condoned, even by a Court supposedly rejecting the need test.

Rather than duplicating the factual situation encountered in Wissner, a 2771 distribution would squarely pose the issue the Court refrained from

answering characterization of military wages. For the years of his absence, the serviceman's undistributed wages and earnings accumulated.[163] On his death, this substantial fund would be distributed to the individual designated by the serviceman. Recogniation of Congressional preemptive intent, in that context, would be the practical equivalent of exempting military wages from community property claims. As previously noted, Wissner cannot be read to validate or justify such a procedure which strikes so directly at the rudiments of justice.

In marked contrast to Wissner's explicit rejection of a claim for insurance proceeds is its tacit acceptance of an action directed at recoupment of insurance premiums.[164] While this observation, in a sense, recognizes the financial needs of the wife to a limited extent, it could be read as fully consistent with the general tenor of the Wissner holding. Thus, if the wife's claim for a portion of the insurance proceeds could only be satisfied from assets other than the federal insurance proceeds, Congressional control of that fund would not be offended. The Court's failure to address the issue in detail necessarily leaves unresolved those cases which necessitate invasion of the federal fund itself to satisfy the wife's claim for a portion of the premiums. Whether the wife's right is to be interpreted as qualifed or limited is unclear in light of the Court's cursory handling of the matter. If the remedy was to be interpreted as consistent with Congressional control over the federal fund, its mention would have little far-reaching importance. So construed, however, the Court, in certain circumstances, would have suggested a right without a remedy. On the other hand, if the majority's purpose in suggesting the alternative was to defer, in a small way, to spousal financial

need, the exception would be significatn for a wife challenging a 2771 distribution.

Depriving a wife of the major portion of her husband's estate which accumulated during his prolonged absence contradicts state laws of community property and dower designed to protect her financial stability. While the applicability of these laws to defeat distribution of a serviceman's unpaid pay allowances under 10 U.S.C. section 2771 is challenged by the Supreme Court decision of Wissner v. Wissner, the factual differences between the two situations coupled with observations by the Wissner justices, indicate the potential for successful attack.

C. Remaining Alternatives

The list of potential remedies that could be asserted by a spouse not named as beneficiary is by no means exhausted after pursuing the foregoing theories. However, for reasons discussed hereafter, the remaining remedies, whick would include attempts to reach the accumulated interest in the USSDP account[165] or, alternatively, suit under the Federal Tort Claims Act,[166] appear far less likely of success.

1. Recovery of Accumulated Interest in USSDP Accounts.

Unlike a similar provision governing the distribution of "money due" federal civilian employess upon death,[167] Section 2771 does not delineate those items that must be paid to settle a serviceman's accounts. Rather, it merely mandates distribution of "an amount due from the armed force of which he was a member." What this sum includes is unclear. The House of Repre-

sentatives Report[168] accompanying the Bill reflects that the statute controls military compensation due the serviceman from the time he was last paid until the date of his death. Such compensation would, at very least, encompass accumulated pay and allowances as legislatively defined.[169] While these definitions would seemingly permit the services to release the principle amount in a USSDP account to the designated beneficiary, it does not so clearly follow that the accumulated interest likewise represents military compensation. Indeed, that sum clearly falls outside the statutory definition of military pay and allowances. Thus, the Internal Revenue Service has refused to classify accumulated interest as pay and allowances for purposes of federal income tax exemption for missing or captured servicemen.[170] Unless the "amount due from the armed forces" can be defined more broadly than simply pay and allowances, it would appear that an aggrieved wife could validly claim at least that portion of her husband's earnings not subject to federal statutory disposition.

Anticipating this very issue, the Army, relying on a decision by the Comptroller General,[171] provided clarification by defining "pay and allowances" to include "soldiers' deposits and interest thereon."[172] The propri= ety and efficacy of this administrative interpretation of statutory provisions can best be gauged by reference to the Comptroller General's decision. That opinion, while failing to define "pay and allowances" to include interest, nontheless found both principal and interest to constitute "items found due" under the statutory provision. The Comptroller based his broad reading of the phrase on legislative history which reflected an intent to go

beyond settlement of pay and allowances, as traditionally defined, alone.[173] In sustaining the claim of the designated beneficiary against that of a legatee, the Comptroller stressed that the statutory language was equivalent to that of an earlier act,[174] which had been interpreted to include interest on accounts. Further, the comptroller observed that the new act's purpose of clarifying and facilitating distributions would be frustrated if a different interpretation were given.[175]

While a decision of the Comptroller General does not carry the weight of judicial precedent, it nonetheless bears careful scrutiny. In this instance, and especially in view of the Court's rationale in Wissner v. Wissner, the decision appears to present an almost insurmountable barrier to recovery. Given the broad reading of the "necessary and proper" clause in Wissner as it applies to fostering the military morale, the authority to control interest is probably beyond question.[176] Further, like Wissner, Congressional intent to clarify the field and avoid past difficulties is clear. This purpose is clearly contrary to continued state prerogative in the area. Finally, like the insurance fund involved in Wissner, the USSDP account is not subject to attachment by creditors.[177] Thus, all of the factors considered controlling in Wissner, would again be encountered in a wife's attempts to save the interest on her spouse's account. It would appear that only if Wissner has ceased to be a valid precedent could the distribution of interest be successfully challenged. Further by highlighting her need and the degree of deprivation, a petitioner would have a far greater chance of avoiding Wissner

by challenging the entire disposition rather than by attacking only the payment of interest on a USSDP account.

2. Federal Tort Claim

While the foregoing theories have focused primarily on recovery of the fund representing the serviceman's accumulated earnings, this does not necessarily imply that this fund is the sole source for satisfaction of the wife's claim. Indeed, even if the distribution itself could not be challenged, a wife might nonetheless seek substitute satisfaction in the form of damages. Thus, if she could establish a personal loss resulting from the negligence of a federal employee[178] acting within the scope of his employment,[179] she could conceivably recover damages under the Federal Tort Claims Act. Contrasted with the other potential remedies, this recourse suggests itself, if only because it can be pursued after as well as before a distribution under 10 U.S.C. 2771[180] However, neither allegations of negligence based on the failure of the servicemen's superior to periodically review and update his designation or founded on the military's neglect to inform the spouse of the procedures for distribution appear sufficiently compelling to support a successful claim.

Failure of the serviceman's superior to periodically update the records of his unit's personnel might constitute an actionable omission[181] because of the superior's duty, established by regulation, to review and revise these documents.[182] The doctrine of Feres v. United States,[183] which precludes on-duty service personnel or their representatives[184] from recovering under the Federal Tort Claims Act for injuries or damages inflicted by another federal

employee, poses a distinct hindrance to recovery. To circumvent the doctrine and successfully pursue her action, a wife would be required to allege and prove damage to herself personally rather than to her spouse alone. Only in a rare instance could a wife establish to the satisfaction of the court that she would have been designated beneficiary except for the government's negligence. Hence, damages to the wife could not generally be proven.

The inability to establish a causative link between the alleged negligent act and the avowed damage[185] would likewise impede a tort claim based on the government's failure to fully apprise a wife of the manner in which her husband's accumulated pay would be distributed. To supply this link, a wife would be required to establish that the loss could have been avoided with adequate information. Mere knowledge of the applicable procedures and of the identity of the designated beneficiary would not necessarily insure minimization or obliteration of the loss. Although a spouse, once informed, could pursue various alternatives to reduce the fund prior to its ultimate distribution,[186] each of these methods whereby the spouse's allocation would be increased or the funds in the USSDP account released, would necessitate acquiescence of the Service Secretary.[187] Since this approval has not been given as a matter of course, establishment of actual damages would be extremely difficult. Only in those cases where the wife personally deposited an unused portion of her own alloted income in the USSDP account under the misassumption that she would ultimately benefit from the funds,[188] could her losses be measured with any degree of accuracy. Even in those cases, however,

recovery would arguably be precluded by the difficulty of establishing a governmental duty of disclosure. Hence, although causes of action filed under the Federal Tort Claims Act might have a strong emotional appeal, they would probably be unsuccessful because of the obvious evidentiary hindrances.

IV. Afterword

The procedure embodied in 10 U.S.C. Section 2771 permits a testamentary disposition of property despite clear non-compliance with the statute of wills. In this respect, however, it is similar to numerous other testamentary devices that permit circumvention of the formalities normally required in will execution. While these will substitutes historically encountered initial resistance,[189] they have now long been accepted as appropriate modes of property disposition on death. Thus, rights of survivorship in jointly owned property, inter vivos and Totten trusts, designation of insurance beneficiaries, and contracts partly performable on death are now as readily accepted as formally executed wills in accomplishing testamentary ends.[190] This departure from strict formality in an attempt to give effect to an individual's intent is laudable.[191] Nonetheless, in rejecting the easily applied rules requiring full compliance with strict testamentary formalities, courts have compounded their burden by subjecting themselves to the difficulties inherent in ascertaining subjective intent.

The ostensible purpose of formal requirements of will execution by which an attempted testamentary disposition must be measured is to establish an individual's true intent. Although, on occasion, this purpose has been lost

sight of, it remains the only compelling justification for the statute. Ashbel Gulliver, erstwhile Dean of the Yale Law School, cited three primary functions served by these formalities and concluded that all testamentary dispositions should be upheld if they satisfied these three functions.[192] First, he noted that a ritual function must be satisfied to impress upon the transferor the seriousness of his act and thereby preclude merely haphazard actions. Next, that formalities of the statute of wills serve as evidentiary function, casting intent in a reliable and permanent form for future judicial consideration. Finally, that formalities fulfill a protective function, preventing undue influence on the transferor.

Viewed in the context of this scheme, testamentary dispositions of unpaid military pay and allowances probably fail to satisfy fully these functions. Time limitations accompanying recruit training and basic unfamiliarity of supervisors with the technicalities of section 2771 distributions generally prevent new service personnel from becoming fully apprised of the important consequences of their actions in designating a beneficiary. For most, the designation represents but one insignificant act in a seemingly unending chain of administrative details that must be completed upon entry into the armed forces. As such, the new serviceman is rarely impressed with the seriousness of his act. Because of his basic unfamiliarity with his new environment in general and with the ramifications of this technical requirement in particular, the recruit is far more receptive to the suggestions of the supervisor directing completion of the forms. Thus, although the evidentiary function of the

statute of wills might be satisfied, the recruits designation might well be both haphazard and the result of undue influence. 10 U.S.C. 2771 was amended in 1955 primarily to give effect to the true testamentary intent of service personnel. This goal can only be accomplished if servicemen fully appreciate the consequences of their actions and carefully deliberate the selection of a beneficiary.

V. CONCLUSION

In 1955, Congress reexamined legislation controlling distribution of the accumulated military pay of a member of the armed forces upon his death and, in response to perceived statutory inadequacies impeding effectuation of the serviceman's true intent under the then prevailing legislation, amended the provision to permit the soldier or sailor to designate personally the beneficiary of this fund. This amendment was intended both as a resolution of longstanding state opposition to federal control over this type of testamentary distribution and as an easily applied tool to ascertain and carry out the fighting man's wishes.

Deferring strictly to the serviceman's designation as dictated by the statutory amendment, service secretaries, on occasion, were forced to neglect the financial needs and matrimonial claims of spouses disregarded by the designation. Nonetheless, during peacetime, such deprivations were not significant enough to compel reevaluation of the statute. Only in the context of the lengthy Vietnam struggle, nearly a decade after the provision's amendment, was this inequity brought into sharp focus by the substantial assets disposed of under the

federal scheme. Thus, whether a result of a serviceman's oversight or design, a significant number of wives were deprived of funds representing the major part of their husband's estate. While certain remedies, suggested in this article, offer the potential of avoiding the inequitable impact of the federal enactment,[193] the effectiveness of the solutions turns, in the end, on the willingness of courts to distinguish cases of apparent precedential value and to construe the legislature in a manner consistent with recognition of a wife's dower or community property interests. Because of the uncertainties of such a course, only Congressional reconsideration can offer a permanent resolution to the dilemma.

FOOTNOTES

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[1]The views expressed in this article are the author's alone and are not the expression of an official position of the Judge Advocate General of the Navy.

[2]The Department of Defense has established the Joint Casualty Resolution Center located in Nakhon Phanom, Thailand, for the purpose of collecting data relevant to the disappearance of American fighting men in Southeast Asia. Under the direction of Brigadier General Robert Kingston, personnel of the Center have undertaken search and recovery operations throughout the area to recover and identify the remains of missing servicemen. See "DoD Makes 'Every Effort' to Find MIAs", COMMANDERS DIGEST, December 6, 1973, p. 2.

[3]37 U.S.C. sections 551-57 (Supp. I 1973)

[4]See note 60 infra.

[5]The so-called Uniformed Services Savings Deposit Plan (hereinafter cited USSDP) was created by 10 U.S.C. 1035 (1970), and permitted servicemen, while in a combat zone, to deposit up to $10,000.00 in an account drawing up to ten percent interest. Servicemen classified PW/MIA have been exempted from the $10,000.00 ceiling. See 10 U.S.C. 1035(b).

[6]10 U.S.C. section 2771 (1970). The remaining alternative distributees are ranked in the following order:

> "(3) Children and their descendants by representation
> (4) Father and Mother, in equal parts, or, if either is dead, the survivor
> (5) Legal representative
> (6) Person entitled under the law of the domicile of the deceased member."

[7]See notes 158-162 infra, and accompanying text.

[8]Interview with LCDR Leyon D. Sakey, JAGC, USN, in San Diego, California, September, 1973.

[9]Defense Department sources listed 1284 servicemen as still missing in action at the termination of hostilities. U.S. NEWS AND WORLD REPORT, June 18, 1973. Ten months after the release of American prisoners of war, approximately 1200 servicemen remained unaccounted for. Los Angeles Times, January 4, 1974, p. 1, col. 1.

[10]See text accompanying notes 26-30 infra.

[11]See notes 35-51 infra, and accompanying text.

[12]See notes 64-188 infra, and accompanying text. This article focuses primarily on the legal theories whereby a spouse, deprived of her husband's accumulated military earnings, can recover a portion of that fund. A separate but closely related issue involves the appropriate forum and procedural framework for an attack. In that latter respect, a suit in federal court challenging a prospective distribution would appear to raise fewer procedural problems than a similar challenge subsequent to governmental release of the funds. Even in that latter instance, however, recourse might nonetheless be had either in a state

court or before a federal tribunal.

In Estate of Kevil, 98 Cal. App. 2d 388, 220 P.2d 555 (1950), the mother of a deceased serviceman petitioned the government for release of one-half of her son's accrued pay. After the mother received that sum, her brother, the legal representative of the serviceman's estate, petitioned and received the remaining portion of the accumulated military earnings which he proposed to divide equally between the mother and her estranged husband. The assignee of the husband's interest challenged this distribution, arguing that the wife should either be compelled to remit the one-half share she had received earlier or, alternatively, have that amount charged against her share of the remaining assets. The court disregarded the mother's contention that the federal funds already in her possession were beyond control of the estate's representative, and held that the released funds were subject to the order of the administrator. Thus, the state court took cognizance of and ruled on an action seeking resolution of rights after rather than before a governmental distribution. The potential significance of this case for wives now challenging accomplished distributions is clear.

The gravamen of Kevil, however, was that the state's traditional control of testamentary dispositions could not be curtailed by federal legislation governing the disposition of a deceased serviceman's earnings. This rationale was refuted in the 1955 amendment of 10 U.S.C. 2771 which explicitly permitted a federal testamentary disposition. See text accompanying note 35 infra. This statutory action does not imply, however, that all state laws affecting a wife's claim to this federally supervised fund are

preempted. Indeed, if the provision can be read in a manner consistent with state dower and community property statutes, Kevil would arguably support a claim by the estate's representative to recover a portion of the accumulated earnings from the designated beneficiary.

See Howell v. United States, 159 F. Supp. 597, 141 Ct. Cl. 699 (1958) regarding the right of a spouse to recover from the federal government directly, even after distribution of the fund to the designated beneficiary; contra Keown v. United States, 191 F.2d 438 (8th Cir. 1951).

[13] See note 3 supra.

[14] 50 App. U.S.C. sections 510-590 (1970).

[15] See, e.g., CAL. PROB. CODE sections 1754-1754.5 (West Supp. 1973); FLA. STAT. ANN. sections 747.02-174.052 (1973 Supp.); N.H. RSA 464:21-a (Supp. 1972); GA. CODE sections 113-2701a to 2709a (1972 Supp.); REV. CODE OF WASH. sections 11.80.010-11.80.130 (1972 Supp.); NEB. LAWS section 1211 (1972).

[16] See, e.g., CAL. REV. & TAX CODE Section 17146.5(d)(1), as added by AB 115, chapter 1973 STATS. (income of military personnel designated PW/MIA excluded from gross income for income tax purposes).

[17] To facilitate transactions under powers of attorney executed by servicemen missing during the Vietnam conflict, California enacted two pieces of new legislation. The fact that a serviceman's death would invalidate an otherwise valid power led to some natural reluctance to accept the servicemen's power while his status remained unresolved. CAL. CIV. CODE section 2356 (West Supp. 1973) affirms those acts performed under an apparently valid

power if done in good faith and without actual knowledge of death. For spouses of missing personnel, the significant portion of the statute reads:

> "[U]ntil receipt by the parties of notice from the secretary of the department . . . concerned, or his delegate, of the termination of such missing status by the making of a finding of death of the absentee, the parties shall be deemed to be without actual knowledge of any such revocation, death or incapacity of the principal."

A companion piece of legislation, Act of August 8, 1972, STATS. 1972, ch. 632, represented an attempt to revive the lapsed powers of missing personnel.

> "In the event an absentee as defined . . . executed a general or special power of attorney which expires during the period which occasions such status, the general or limited power of attorney shall be continued in full force and effect until 30 days after such absentee status is terminated. Any person, representative, corporation, officer or body who acts in reliance upon any such power of attorney when accompanied by a copy of the written report or record issued by an employee of the United States . . . shall be relieved from any liability for relying and acting upon the power of attorney."

[18]The personal problems displacements and dislocations experienced by servicemen and their families during times of armed conflict and engendered by prolonged separation span virtually every conceivable field. See H. McCubbin, J. Hunter, P. Metres, "Adaptation of the Family to the PW/MIA Experience," Navy Medical Neuropsychiatric Research Unit Report No. 73-62. Consequently, it is not surprising that legal problems too should be compounded during a husband's absence. Indeed, during the recent Vietnam conflict, this conclusion was borne out. Correspondence from 42 wives of Marine Corps personnel designated PW/MIA received at Headquarters, Marine Corps, provide a general summary of the broad types of legal problems encountered by wives during their husband's absence. The general nature of the problem and frequency of its mention is reflected in the following table:

General Area of Legal Concern	Specific Problem	Frequency of Response
Purchase, Sale & Disposition of Property	Questions regarding power of attorney	13
	Difficulty purchasing or refinancing home	3
	Difficulty selling automobile	1
	Establishing conservatorship	4
Domestic Problems	Divorce procedures in husband's absence	6
	Propriety of remarriage without divorce	2
	Impact of Soldiers and Sailors Civil Relief Act on divorce action	5
	Impact of divorce on military allotment	2
	Legal status of remarriage should serviceman return	1
	Adoption attempts in husband's absence	1
Status Determinations and Declarations of Death	Military procedures for declarations of death	14
	State court procedures for declarations of death	1
	Impact of state determinations on military declarations of death	4
Availability of Federal Benefits	Disposition of serviceman's pay	3

General Area of Legal Concern	Specific Problem	Frequency of Response
	Impact of divorce on allotment	2
	Increasing or decreasing allotment	42
	Military movement of household goods	42
	Procurement of military identification cards	42
	Availability of VA benefits	3
Estate Administration	Intestate procedures	1
	Impact of divorce on inheritance	4
	Disposition of husband's accumulated earnings	3
	Federal and state inheritance tax abatement	2

[19]Thus, the federal government compensates the widow with a so-called six-month death gratuity [10 U.S.C. sections 1475-1480 (Supp. I 1973)], provides for federally supervised Servicemen's Group Life Insurance [38 U.S.C. section 765 et seq. (Supp. I. 1973)], assists with burial arrangements [10 U.S.C. sections 1481-82 (1970)] and provides dependents indemnity coverage [38 U.S.C. section 410-422 (Supp. I., 1973)].

[20]See note 35 infra, and accompanying text. Federal invasion of this area of state testamentary control was noted in Goldberg, Is Armed Services Retired

Pay Really Community Property? 48 CAL. BAR J. 12 316-17 (1973):

> "This right of designation is based on a statute, which gives the serviceman a power of 'testamentary disposition' like, that he would have 'under the general laws of most States.' The statute supersedes the cases indicating that prior statutes not only did not, but constitutionally could not provide a federal right of testamentary disposition, and allowing recovery under state law, from the beneficiaries paid under federal law."

[21]See Estate of Kevil, 98 Cal. App. 2d 388, 220 P.2d 555 (1950); Scamman v. Scamman, 90 N.E. 2d 617 (Ohio Com. Pl. 1950); Stone's Estate, 58 Pa. D. & C. (1946). See generally notes 26-30 infra, and accompanying text.

[22]Initially, most distributions intended to have testamentary effect were measured by the formalities of the statute of wills. Hence, certain will substitutes were, on first inspection, rejected because of non-compliance with the statute's technicalities. See, e.g., Butler v. Sherwood, 196 App. Div. 603, 188 N.Y.S. 242 (1921) [deed subject to revocation and effective on demise]; Tensfield v. Magnolia Petroleum Co., 134 Okla. 38, 272 P. 404 (1928) [designation of beneficiary of employee stock purchase plan]; Matter of Ihmsen, 253 App. Div. 472, 3 N.Y.S. 2d 125 (1938) [bank holding securities in custodian account, payable on death]; American University v. Conover, 115 N.J.L. 468, 180 A. 830 (1935). In re Murphy's Estate, 191 Wash. 180, 71 P.2d 6 (1937) rev'd on rehearing, 193 Wash. 400, 75 P.2d 916 (1938) [contract performable on death]; Beaver v. Beaver, 117 N.Y. 421, 22 N.E. 940 (1889) [tentative trust].

[23]Among the testamentary dispositions that have received judicial approval despite arguable non-compliance with the formalities of will execution are designations of retirement plan beneficiaries [see Wallace v. Lincoln Nat'l

Life Ins. Co., 212 A.2d 767 (D.C. App. 1965); Rogers v. Rogers, 152 So. 2d 183 (Fla. App. 1963); but see Neeley v. Lockton, 63 Wash. 2d 929 (1964) where recognition of the testamentary designation was denied because of a conflict with state community property standards.], Totten trusts [See, e.g., Brucks v. Home Fed. S. and L. Ass'n, 36 Cal. 2d 845, 228 P.2d 548 (1951): Koslosky v. Cis, 70 Cal. App. 2d 174, 160 P.2d 565 (1945)], and inter vivos insurance trusts [Eaton v. Husted, 141 Tex. 349, 172 S.W. 2d 493 (1943); Wilson v. Fulton Nat'l Bank, 188 Ga. 691, 4 S.E. 2d 660 (1939)]. On occasion, courts have interpreted property dispositions, seemingly testamentary in nature, as valid present transfers of property to avoid the requisites of the statute of wills. Thus, where a seller has agreed to cancel his debtor's obligation on the creditor's death, the device has been accepted as valid present consideration for a binding contract rather than an unlawful evasion of the statute. See, e.g., Nunnally v. Wilder, 117 App. D.C. 377, 330 F.2d 843 (1964); Kauffman v. Kauffman, 130 Colo. 583, 278 P.2d 179 (1954); Estate of Howe, 31 Colo. 2d 395, 189 P.2d 5 (1948). Similarly, a deed of property during one's lifetime with a reserved life estate and a right of revocation has been upheld as a valid present transfer of land. See Tennant v. Tennant Memorial Home, 167 Cal. 570, 140 P. 242 (1914); but see Schroeder v. Wilson, 89 Cal. App. 2d 63, 200 P.2d 176 (1948).

[24]See text accompanying notes 27-30 infra.

[25]See Act of Feb 25, 1946, ch. 35, section 1, 60 Stat 30., as amended 10 U.S.C. section 2771 (1970).

"Hereafter in settlement of the accounts of deceased officers or

> enlisted persons of the Army, where no demand is presented by a duly appointed legal representatibe of the estate, the accounting officers may allow the amount found due to be paid to the decedent's widow, widower or legal heirs in the following order of precedence:
>
> (1) to a duly appointed legal representative if a claim is submitted by him before settlement with a person of another authorized class.
>
> (2) to the widow or widower
>
> (3) to the children
>
> (4) to the father and mother in equal parts."

The inequities which had arisen under this predecessor provision justified, in part, the statutory revision in 1955. See H.R. Rep. No. 833, 84th Cong., 1st Sess. (1955) which described those inequities in the following terms:

> " . . . under the existing law considerable administrative effort is required in order to determine the persons entitled to the pay balances due the estates of deceased servicemen. Cases often require the Comptroller to determine the validity of marriages, divorces and legitimacy, and often involve determinations under the laws of the various states. . . . "
>
> "Also, under existing law, the 'father desertion' and 'foster parent' cases present troublesome problems. As to the first class, objection often is raised to payment (as required by existing law) to a father who deserted his wife and family while the children were small. As to the second class, a natural parent usually receives the balance due the decedent to the exclusion of a foster parent who may have reared the serviceman from infancy to manhood."

[26]See cases cited in note 21 supra.

[27]See Stone's Estate, supra note 21, at 159-160.

[28]See, e.g., Estate of Kevil, 98 Cal. App. 2d at 391-92, 220 P.2d at 557:

> "Inasmuch as the power to pass laws regulating succession to property is reserved to the states under the Tenth Amendment

> to the Constitution of the United States, the statute must be regarded as procedural in nature and not as a statute of succession. It is only in those cases in which no legal representative makes a demand therefore that the accounting office is permitted to pay to the heirs of a decedent any amount due to him. The obvious purpose of the statute is to settle and dispose of amounts due deceased members of the armed forces where no probate is contemplated to the end that any balances remaining to the credit of any such deceased member may be distributed to the heirs entitled to succeed thereto under the laws of descent and distribution. The statute recognizes the primary right of a legal representative of the estate to demand and receive the amount due and does not require that any such amount be allowed to anyone except a legal representative."

[29]58 Pa. D & C (1946).

[30]Id. at 159-160.

[31]191 F.2d 438 (8th Cir. 1951)

[32]For this assertion of purpose, the court relied on expressions in Sen. Rep. No. 839, 78th Cong., 1st Sess. (1944).

[33]Keown, supra note 31, at 441-42.

[34]159 F. Supp. 597, 141 Ct. Cl, 699 (1958). Like Keown, Howell involved an attempt by the executrix to recover amounts distributed by the government before she could qualify as the estate's representative. Unlike Keown, however, the Howell court held that the provision establishing the representative as the first priority would be emasculated if an individual was not allowed adequate opportunity to qualify as the representative of the estate. Thus, the court disregarded the factor deemed compelling in Keown; speed of distribution.

[35]See H.R. Rep. No. 833, 84th Cong., 1st Sess. (1955):

> "The purpose of the proposed legislation is to facilitate the settlement of the final pay account of the deceased members

> of the Armed Forces by providing that military members may designate a beneficiary to receive their final pay . . . . The proposed legislation will permit the soldier himself to designate a beneficiary for his final pay. The measure in substance, by permitting a designated beneficiary, provides for a testamentary disposition by the serviceman of that part of his estate representing his final pay."

[36]See, e. g., Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954); Clearfield Trust Co. v. United States, 318 U.S. 363 (1941); Gibbons v. Ogden, 9 Wheat. 1, 210-211 (1824).

[37]See McCulloch v. Maryland, 4 Wheat. 316 (1819).

[38]Railroad Retirement Act of 1937, 45 U.S.C. section 228e(f)(2) (1970).

[39]See note 19 supra.

[40]See 31 U.S.C. 757(c) (1970); 31 C.F.R. 315.61 (1973).

[41]Act of August 3, 1950, Ch. 518, section 1, 64 Stat. 395, as amended 5 U.S.C. section, 5582 (1970).

[42]See, e.g., Eakin v. Railroad Retirement Board, 310 F.2d 370 (7th Cir. 1962); Allen v. Allen, 363 S.W. 2d 312 (Tex. Civ. App. 1962). [Railroad Retirement Act]; Wissner v. Wissner, 338 U.S. 655 (1950) [National Service Life Insurance]; Free v. Bland, 369 U.S. 663 (1962) [survivor's rights in U.S. Savings Bonds].

[43]Congressional power in this area of military morale derives from the constitutionally enumerated power to provide for the national defense, according to the majority in Wissner, supra note 42, at 661.

[44]See 45 U.S.C. section 228 e(f)(2):

> "Whenever it shall appear, with respect to the death of an employee on or after January 1, 1947, that no benefit, or no further benefits, other than benefits payable to a widow, widower, or parent upon attaining age sixty at a future date,

> will be payable under this section or, pursuant to subsection (k) of this section, upon attaining the age of eligibility at a future date, will be payable under Title II of the Social Security Act, there shall be paid to such person or persons as the deceased employee may have designated by a writing filed with the Board prior to his death . . . ."

[45]See Eakin v. Railroad Retirement Board, supra note 42.

[46]See note 41 supra.

[47]See note 43 supra.

[48]Since the source of premium payments was community assets, under prevailing community property standards, the proceeds of the policy would likewise be characterized as community in nature. See cases cited in note 129 infra.

[49]Free, supra note 42.

[50]Id. at 666. See Gibbons v. Ogden, 9 Wheat. 1, 210-11 (1824).

[51]See U.S. Const. Art. I, Section 8, Cl.12.

[52]See note 9 supra.

[53]37 U.S.C. section 555 (1970):

> "(a) When a member of a uniformed service entitled to pay and allowances under section 552 of this title has been in a missing status, and the official report of his death or of the circumstances of his absence has not been received by the Secretary concerned, he shall, before the end of a 12-month period in that status, have the case fully reviewed. After that review and the end of the 12-month period in a missing status, or after a later review which shall be made when warranted by information received or other circumstances, the Secretary concerned, or his designee, may:
> (1) if the member can reasonably be presumed to be living, direct a continuance of his missing status; or
> (2) make a finding of death."

[54]While the presumptive finding of death issued under the Federal Missing Persons Act establishes the fact and the presumptive date of death for the limited

purpose of permitting settlement of military accounts, 32 C.F.R. Sec. 718 (1973), it is apparent that the potential impact of the determination is more far-reaching. In excess of thirty states recognize the federal determination as prima facia evidence of death. Thus, the secretarial decision can play a significant part in distribution of insurance proceeds upon death, probate of estates and lapse of bequests, all matters of state concern in which the fact as well as the date of death play a significant role. Further, while some state tribunals have carefully scrutinized and, in the end, disregarded the federally ascertained date of death, see Haynes v. Metropolitan Life Ins. Co., 262 Md. 255, 277 A.2d 251 (1971); In re Thornburg's Estate, 186 Ore. 570, 208 P.2d 349 (1949); Lukens v. Camden Trust Co., 62 A.2d 886 (N.J. 1948), most presumptive findings of death go unchallenged. Hence, it is conceivable that virtually all significant rights turning on determination of the fact and time of death could be determined without the benefit of a thorough federal or state evidentiary hearing.

[55]The Navy is the only branch of the Armed Forces which has supplemented the statutory provision with regulations governing determinations of death. See 32 C.F.R. section 718(10(b) (1973):

> "Whenever, subsequent to the expiration of the twelfth month, cumulative or other evidence establishes by its preponderance that a 'missing' person is no longer alive, a prompt finding of presumptive death will be made. Also, such a finding will be made whenever justified by the lapse of time beyond the 12 months' absence without specific information being received."

[56]See McDonald v. McLucas, 73 Civ. 3190 (S.D.N.Y. Feb 13, 1973) wherein plaintiffs, dependents of five Vietnam servicemen classified MIA, argued

that the lack of specific legislative guidelines for federal determinations of death and the dearth of administrative regulations governing the field, see note 54 supra, subject the enactment to constitutional challenge.

In early February of 1974, a three judge federal district court, sitting in New York City, handed down an opinion that concurred, in all pertinent respects, with the petitioner's argument and held the statute unconstitutional, both on its face and, as applied. The court held, that as matter of due process, the families of servicemen missing in action were entitled to participate in a full hearing, challenge the government's case and present any relevant information before a presumptive finding of death could be issued.

[57]The reticence of the services to classify personnel killed in action might be explicable in terms of a small number of errors in classification. Thus, by illustration, the Navy listed four individuals, LCDR Porter Halyburton, LT Gary Thornton, CDR Robert Doremus and CAPT Fred A. Franke, as killed only to discover that they were still alive in North Vietnam.

[58]While wives, seeking to resolve the status of their unaccounted for spouses, could initiate an action for a declaration of death before a state court, see, e.g., CAL. PROB. CODE sections 1170 et. seq. (West Supp. 1973), such a procedure would be fraught with difficulties and might, in the end, be inconsequential. Unless the length of the serviceman's absence permitted invocation of the commonly accepted presumption of death arising after a seven year absence, the evidentiary burden of establishing death at some earlier time, either

circumstantially, see In re Woods Estate, 62 A.2d 883 (1949); Cox v. Ellsworth, 18 Neb. 664, 26 N.W. 460 (1886), or under the "specific peril" doctrine, Davie v. Briggs, 97 U.S. 628, 634 (1878); Herold v. Washington Nat. Ins. Co., 128 Pa. Super. 563, 566 (1937); In re Wylie's Estate, 134 Misc. 715, 236 N.Y.S. 370 (1929), would be nearly insurmountable. Even if a wife could gain access to classified government documents bearing on her husband's disappearance, her quest would probably be hindered by the same lack of detail that prevented the government authorities from making an initial declaration of death.

Beyond the evidentiary difficulties of a state death action, the limited impact of even the successful suit would, in all likelihood, defeat its purpose. For while a federal presumptive finding of death is significant in a state tribunal, see note 54 supra, the converse is not true. Thus, while the state determination would permit remarriage, distribution of commercial insurance proceeds and estate administration, federal insurance proceeds, death benefits and accumulated military pay would remain unaffected.

[59]While designated PW/MIA, the pay of servicemen continues unabated. See 37 U.S.C. section 552 (Supp. I, 1973)

[60]10 U.S.C. section 1035 (Supp. I. 1973):

> "(a) Under joint regulations prescribed by the Secretaries concerned, a member of the armed forces who is on a permanent duty assignment outside the United States or its possessions may deposit during that tour of duty not more than his unalloted current pay and allowances in amounts of $5.00 or more, with any branch, office or officer of a uniformed service. . . ."
> "(b) Interest at a rate prescribed by the President, not to exceed 10 per centum a year will accrue on amounts deposited under this section. However, the maximum amount upon which interest may be paid under this Act to any member is $10,000,

except that such limitation shall not apply to deposits made on or after September 1, 1966, in the case of those members in a missing status, as defined in section 551(2) of Title 37, during the Vietnam conflict."

[61] See 37 U.S.C. section 553 (1970):

"(a) Notwithstanding the end of the period for which it was made, an allotment . . . made by a member of a uniformed service before he was in a missing status may be continued for the period he is entitled to pay and allowances under section 552 of this title.
"(b) When there is no allotment in effect, or when it is insufficient for a purpose authorized by the Secretary concerned, he, or his designee, may authorize new allotments or increases in allotments that are warranted by the circumstances and payable for the period the member is entitled to pay and allowances under section 552 of this title."

[62] Department of Defense Pay Manual, paragraphs 70801-70819.

[63] Interview with Mrs. Iris Powers, Chairman, National League of Families of American Prisoners and Missing in Southeast Asia, in San Diego, California, September 28, 1973.

[64] See notes 26-29 supra, and accompanying text.

[65] In this respect, however, see notes 142-143, infra and accompanying text concerning the possible limited impact of 10 U.S.C. section 2771.

[66] See text accompanying notes 70-125 infra.

[67] See text accompanying notes 126-164 infra.

[68] See text accompanying notes 178-188 infra.

[69] See text accompanying notes 167-177 infra.

[70] See, e.g., 32 C.F.R. section 533.22 (1973).

[71] See 10 U.S.C. section 2771(b) (1970).

[72] See note 35 supra.

[73]See e.g., Nance v. Hilliard, 101 F.2d 957 (8th Cir. 1939); Dogariu v. Dogariu, 306 Mich 392, 11 N.W. 2d 1 (1943); Cook v. Cook, 17 Cal. 2d 639, 111 P.2d 322 (1941); Wannamaker v. Stroman, 167 S.C. 484, 166 S.E. 621 (1932); but see Pedron v. Olds, 193 Ark. 1026, 105 S.W. 2d 70 (1937). See generally G. CROUCH, INSURANCE, Section 28:66 (2d ed. 1960)

[74]See note 78 infra.

[75]See note 80 infra.

[76]See, e.g., Claffy v. Forbes, 280 F. 233 (W.D. Wash. 1922); Watenpaugh v. State Teacher's Retirement System, 51 Cal. 2d 675, 336 P.2d 165 (1959).

[77]This view was typified by the language of the court in Johnson v. White, 39 F.2d 793,796 (8th Cir. 1930):

> "The intention, desire, and purpose of this soldier should, if it can reasonably be done, be given effect by the courts, and substance, rather than form, should be the basis of the decisions of courts of equity. The clearly expressed intention and purpose of the deceased to have his wife named as the beneficiary in this insurance should control, and should not be thwarted by the fact that all the formalities for making this purpose effective may not have been complied with."

Accord Bratcher v. United States, 205 F.2d 953 (8th Cir. 1953); Bradley v. United States, 143 F.2d 573 (10th Cir. 1944), cert. denied 323 U.S. 793 (1945).

[78]See Crisuiolo v. United States, 239 F.2d 280 (7th Cir. 1956); Serrato v. United States, 173 F.2d 493 (2d Cir. 1949); Kendig v. Kendig, 170 F.2d 750 (9th Cir. 1948); Owens v. United States, 251 F. Supp. 114 (D.S.C. 1966).

[79]5 U.S.C. sections 2091 et. seq. (1970). See Sears v. Austin, 292 F.2d 690 (9th Cir. 1961), cert. denied 368 U.S. 929 (1961); but see Breckline v. Metropolitan Life Insurance Co., 406 Pa. 573, 178 A.2d 748 (1962).

[80]See, e.g., Hulsart v. United States, 86 F. Supp. 902 (Ct. Cl. 1949); Lyles v. Teachers' Retirement Board, 33 Cal. Rptr. 328 (1963); Wicktor v. County of Los Angeles, 177 Cal. App. 2d 390, 2 Cal. Rptr. 352 (1960); Watenpaugh v. State Teachers' Retirement System, supra note 76; First Western Bank and Trust Co. v. Omizzolo, 176 Cal. App. 2d 555, 1 Cal. Rptr. 758 (1959).

[81]See Gulliver and Tilson, Classification of Gratuitous Transfers, 51 YALE L. J. 1, 2-3 (1941):

> "One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power. This is commonplace enough, but it needs constant emphasis, for it may be obscured or neglected in inordinate preoccupation with detail or dialectic. A court absorbed in purely doctrinal arguments may lose sight of the important and desirable objective of sanctioning what the transferor wanted to do, even though it is convinced that he wanted to do it.
>
> "If this objective is primary, the requirements of execution, which concern only the form of the transfer--what the transferor or others must do to make it legally effective--seem justifiable only as implements for its accomplishment, and should be so interpreted by the courts in their cases. They surely should not be revered as ends in themselves, enthroning formality over frustrated intent."

[82]280 F. 233, 234-35.

[83]See, e.g., Steele v. Suwalski, 75 F.2d 885 (7th Cir. 1935); United States v. Tuebert, 57 F.2d 895 (2d Cir. 1932); Claffy v. Forbes, supra note 76.

[84]See note 73 supra.

[85]This trend toward a military "affirmative act" rule in the context of servicemen's insurance benefits was reflected in two early cases, Johnson v. White, 39 F. 2d 793 (8th Cir. 1930) and Kaschefsky v. Kaschefsky, 110 F.2d 836 (6th Cir. 1940),

which sustained changes despite non-compliance with formal requirements but hinted that a beneficiary change would not be upheld unless the serviceman did everything within his power to effectuate a change.

[86]143 F.2d 573 (10th Cir. 1944), cert denied 323 U.S. 793 (1945).

[87]Id. at 572:

> "The undisputed evidence fully supports the finding of the trial court to the effect that the insured expressed an intent to change the beneficiary of his insurance from his mother to his wife, and if the expressed intent of the insured, without more, will justify the judicial substitution of the intended beneficiary, the judgment of the trial court is correct and should be affirmed. But the principle which actuates the courts in giving effect to the ascertained intention of the insured has application only where the party has attempted to act for himself. The expressed intention of the insured to change the beneficiary, standing alone and unaccompanied by some affirmative act, having for its purpose the effectuation of his intention, is insufficient to effect a change of beneficiary and the courts cannot act when he has not first attempted to act for himself."

[88]See, e.g., O'Brien v. Elder, 250 F.2d 275 (5th Cir. 1957); Kluge v. United States, 206 F.2d 344 (4th Cir. 1953); Zabor v. United States, 113 F. Supp. 287 (W.D.N.Y. 1953), aff'd 212 F.2d 440 (2d Cir. 1954).

[89]See notes 108-113 infra.

[90]See, e.g., Stone v. United States, 272 F.2d 746 (5th Cir. 1959); Ford v. United States, 94 F. Supp. 223 (E. D. Tenn. 1949).

[91]See, e.g., Smith v. United States, 421 F.2d 634 (5th Cir. 1970); United States v. Smith, 159 F. Supp. 741 (S.D.N.Y. 1958).

[92]See, e.g., Ward v. United States, 371 F.2d 108 (7th Cir. 1966); Moore v. United States, 129 F. Supp. 456 (N.D. Cal. 1955).

[93]This effect of Bradley was criticized in a perceptive comment in the Yale Law

Journal attacking the application of rules distilled in a commercial insurance context to servicemen's insurance: "It is generally held that a war risk insurance policy is a contract completely statutory in basis, and that the rights and duties of the parties stem not from the rules which govern private life insurance, but from the statutes and regulations passed expressly for war risk insurance." Comment, Change of Beneficiary Under National Service Life Insurance, 54 YALE L. J. 451 (1945). For a contrasting view which praises the approach taken in Bradley, see Note, 60 HARV. L. REV. 1349 (1947).

[94]See note 98-100 infra.

[95]See note 102-107 infra.

[96]See notes 108-113 infra.

[97]30 Stat. 711 (1914), as amended, 40 Stat. 398 (1917).

[98]13 F.2d 763 (4th Cir. 1926) [beneficiary change based on letter expressing intent to amend and forwarded to foster parents].

[99]75 F.2d 885 (7th Cir. 1935) [Beneficiary change based on letter to father expressing intent].

[100]280 F. 233 (9th Cir. 1922).

[101] See, e.g., Claffy, supra note 100, at 234-35:

> "The only purpose of the regulations having relation to change of beneficiary, is to enlarge the right of the insured, and to protect the insurer. To hold the designation in the letter sufficient does not change the liability of the insurer, and is within the privilege granted the insured.
>
> ". . . and form, formality, and legal technicality must give way to common sense and remedial justice, when all doubt is removed as to the intent of the deceased soldier; and when the purpose of the soldier, who exposed his life in the army for the safety

of the government, should sufficiently appear . . . ."

Accord United States v. Tuebert, 57 F.2d 895,(2d Cir. 1932):

> "There is no doubt that it was his intention to change the benefi ciary. His intention is clear to name his wife as his beneficiary . . . . It would be unnatural to assume, under the circumstances, (11 years of marriage) that he intended to leave this money to his sister and leave his wife and children penniless. The real intent of the soldier should govern."

[102]Appeal of Colemen, 33 Pa. D. & C. 2d 191 (1964); Rogers v. Rogers, 152 So. 2d 183 (Fla. App. 1963); Kurtz v. Dickson, 194 Va. 957, 76 S.E. 2d 219 (1953).

[103]E.g., Watenpaugh v. State Teachers' Retirement System, supra note 76, at 681-82, 336 P.2d at 169:

> "The statute should be construed to give effect to an executed designation when there is a clear manifestation of intent by the member to make the change and the designation is filed promptly after death so as to prevent any prejudice to the retirement system.
> . . . .
> "It is true that in ordinary life insurance contracts the general rule is that there must be strict compliance with the method prescrived by the policy for change of beneficiary. However, the provisions for death benefits under retirement systems differ in important respects from ordinary life insurance policies. For example, the retirement benefits are completely statutory in origin ... and the requirements for change of beneficiary are not subject to negotiation. The cases dealing with ordinary life insurance contracts are therefore not controlling."

[104]See note 80 supra

[105]See note 76 supra

[106]47 Cal. Rptr. 139 (1965).

[107]Typical of this line of cases which appear to recognize the "affirmative act" rule but which, in actuality, disregard strict application of that standard was Gallagher, supra note 106, at 145, wherein the court noted:

> "The cases we have studied in connection with the problem compel us to a determination that courts have uniformly required an affirmative act by the insured primarily because of their understandable reluctance to base decisions solely upon the uncorroborated and self-serving testimony of the substituted beneficiary. The desired result is clearly achieved where the affirmative act of the insured is established by a writing of some kind or by testimony independent of that furnished by the substituted beneficiary that the insured attempted, at least expressed an intent to change his beneficiary."

[108]Gann v. Meek, 165 F.2d 857 (5th Cir. 1948), cert. denied 334 U.S. 849 (1948); but see Butler v. Butler, 177 F.2d 471 (5th Cir. 1949) limiting Gann to its facts and Note, 9 PITTS. L. REV. 307 (1948), likewise critical of the opinion.

[109]Hornbaker v. United States, 94 F. Supp. 881 (W.D. Pa. 1951); Horn v. United States, 88 F. Supp. 310 (E.D. Pa. 1949); Horn v. United States, 88 F. Supp 310 (E. D. Pa. 1949); contra Butler v. Butler, supra note 108.

[110]United States v. Williams, 145 F. Supp. 308 (S.D. W. Va. 1956).

[111]Hurt v. United States, 84 F. Supp. 912 (3d D. N.J. 1949).

[112]Egleston v. United States, 71 F. Supp. 114 (E.D. Ill. 1947), aff'd 168 F. 2d 67 (7th Cir. 1948).

[113]United States v. Pahmer, 238 F.2d 431 (2d Cir. 1956), cert denied 352 U.S. 1026 (1957).

[114]These peculiarities were recognized in 1 SCHOULER, LAW OF WILLS, EXECUTORS AND ADMINISTRATORS (6th ed. 1923) section 439n:

> "The general danger to which all soldiers are exposed . . . the changes of being suddenly posted elsewhere without good opportunity to arrange one's affairs, not to add other reasons, such as the inconvenience of procuring writing materials in camp suitable for solemn documents, the absence of legal advisers, and the unskillfullness and illiteracy often found among military comrades . . . ."

[115]See, e.g., Claffy v. Forbes, 280 F. 233, 235 (W.D. Wash. 1922), wherein the court, relying on The Customs of Duchy of Burgundy, printed at Dijon, 1694, p. 410; Contumes de Paris, column 51, Paris, 1714, noted:

> "Throughout the history of the civilized world, since the decrees of Julius Caesar, the intention and wish of the soldier, with relation to designation of beneficiary or disposition of property, killed in the line of duty, has been carried out when ascertained, whether it was scrawled in the sand with the point of his sword, or written on the scabbard of his sword or his shield."

[116]These Boards were established pursuant to authority granted in section 207 of the Legislative Reorganization Act of 1946, 60 Stat. 837 as reenacted and codified in 10 U.S.C. 1552 (1970).

[117]See 10 U.S.C. section 1552(a) (1970).

[118]See, e.g., Van Bourg v. Nitze, 388 F.2d 557, 128 App. D.C. 301 (D.C. Cir. 1967).

[119]See, e.g., Caddington v. United States, 178 F. Supp. 604, 147 Ct. Cl. 629 (1959).

[120]See, e.g., McDonald v. United States, 436 F.2d 477, 193 Ct. Cl. 795 (1971).

[121]See, e.g., Sherengos v. Seamans, 449 F.2d 333 (4th Cir. 1971).

[122]See, e.g., Hoffman v. United States, 175 Ct. Cl. 457 (1966); Grubin v. United States, 333 F.2d 861, 166 Ct. Cl. 272 (1964).

[123]See 10 U.S.C. section 1552 (1970); McDonald v. United States, 436 F.2d 477, 193 Ct. Cl. 795 (1971); Gearinger v. United States, 412 F.2d 862, 188 Ct. Cl. 512 (1969); Ogden v. Zuckert, 298 F.2d 312, (D.D.C. 1961).

[124]32 C.F.R. section 723.3(e)(2)(1973).

[125]The possibility of suit by the designated beneficiary, see McDonald V. United

States, supra note 123, might, however, gravitate against Board action in the case of a distribution under 10 U.S.C. section 2771.

[126]See Thompson v. Morrow, 5 Serg. & R. 289 (Pa. 1819), containing citations from Yearbooks dating to the reign of Henry III (1216-1272) regarding dower rights. See generally, C. VERNIER, AMERICAN FAMILY LAWS, Sections 188-189 (1935).

[127]See cases cited in note 142 infra.

[128]See, e. g., Commissioner v. Wilkerson, 368 F.2d 553 (9th Cir. 1966); Free v. Bland, 369 U.S. 663 (1962); Wissner v. Wissner, 338 U.S. 655 (1950).

[129]See generally Commissioner v. Wilkerson, supra note 128, Fithian v. Fithian, 10 Cal. 3d 592, P.2d , 111 Cal. Rptr. 369 (1974); Estate of Allie, 50 Cal. 2d 794, 329 P.2d 903 (1958); Estate of Prettyman, 133 Cal. App. 2d 1 (1955).

[130]O'Connor v. Travelers Insurance Co., 169 Cal. App. 2d 763, 337 P.2d 893 (1959). Bazzell v. Endriss, 41 Cal. App. 2d 463, 107 P.2d 49 (1940); New York Life Insurance Co., v. Bank of Italy, 60 Cal. App. 602, 214 P. 61 (1923).

[131]Wissner, supra note 128, at 657, n. 2. The California Supreme Court has ruled that military pay is community property. See French v. French, 17 Cal. 2d 775, 112 P.2d 235 (1941).

[132]See note 164 infra. The Court noted: "Major Wissner's army pay which was held to be community property under California law, was the source of the premiums paid on the policy. But no claim was made for the premiums; the widow sought the proceeds of the insurance." 338 U.S. at 657-58.

[133]Id. at 660.

[134]Pension Bonuses and Veterans' Relief Act, ch. 510, section 3, 49 Stat. 609 (1935), as amended 38 U.S.C. section 454(a)(1970).

[135]See, e.g., Schlaefer v. Schlaefer, 71 App. D.C. 350, 112 F.2d 177 (1940); In re Guardianship of Bagnall, 238 Iowa 905, 29 N.W. 2d 597 (1947); Tully v. Tully, 159 Mass. 91, 34 N.E. 79 (1893).

[136]338 U.S. at 660.

[137]Id. at 660, n. 4:

> "There are, of course, support aspects to the community property principle, and in some cases they may be of considerable importance. Likewise alimony may not be limited to the amount essential to support the divorced spouse. But we do not think the Congress would have intended decision to turn on factual variations in the spouse's need. If there is a distinction to be drawn, we think it must be based upon a generalization as to the dominating characteristics of a particular class of cases--alimony cases, support cases, community property cases. The alimony cases have uniformly been decided on that basis."

[138]338 U.S. at 662

[139]Id. at 664

[140]Free v. Bland, supra note 43.

[141]Id. at 663.

[142]Wissner can, however, be construed in a manner consistent with continued applicability of state community property standards. Thus, California courts have read the decision quite narrowly to require that the state "refrain from administering those incidents of community property" only when they would "frustrate the Congressional plan." Fithian v. Fithian, 10 Cal. 3d 592,598, 111 Cal Rptr. 369,372 (1974). Hence, the statute would not obliterate all incidents of community property, but only those in conflict with the clear

Congressional purpose.

The Congressional plan reflected by Wissner and noted by forums interpreting that decision was the enhancement of the serviceman's spirit through the protection of his personal choice of beneficiary. Where that personal choice died before payment of a serviceman's insurance proceeds, the California supreme court, in Estate of Allie, 50 Cal. 2d 794, 329 P.2d 903 (1958), noted that the Congressional purpose could not be fulfilled and held that Wissner would not mandate the disregard of community property standards. Thus, sisters of the deceased serviceman were permitted to establish a community property claim to one-half of the insurance proceeds against the heirs of the designated beneficiary under CAL. PROB CODE section 228 as amended STATS 1970, c. 345, p. 738, section 1:

> "If the decedent leaves neither spouse nor issue, and the estate or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent devise or bequest . . . then one-half of such community property goes . . . in equal shares to the [heirs of] . . . the decedent . . . and the other . . . in equal shares to the [heirs of] . . . said [previously] deceased spouse . . . ." Accord Estate of Prettyman, 133 Cal. App. 2d 1 (1955). Fifteen years after Estate of Allie was decided, the California supreme court held that the Wissner decision did not exempt military retirement pay from community property claims. Distinguishing Wissner, the court noted: "It does not follow therefrom that applying community property law to retirement pay creates a disincentive to establishing a career in the military, or detracts from a serviceman's spirit or future security." Fithian v. Fithian, 10 Cal. 3d at 598, 111 Cal Rptr. at 373. See note 143

infra. See also Comment, Applicability of Community Property Laws to National Service Life Insurance, 47 CAL. L. REV. 374 (1959); Note 32 S. CAL L. REV. 199 (1959). for two consistent views arguing the limited application of Wissner.

[143]338 U.S. at 658-59. The significance attached to the Supreme Court's discussion of Congressional purpose in Wissner is readily apparent from the decisions which have distinguished that opinion to recognize community property rights. See note 142 supra. In this regard, the California supreme court, in Fithian, supra note 142, at 601-602, 111 Cal. Rptr. 375, noted:

> "Although a serviceman's retirement pay does not pass to his family when he dies, the serviceman retains the right to designate a beneficiary to receive any arrearages in pay which are due but unpaid at his death. The designation right is derived from a statute which gives the serviceman a power of testamentary disposition over any money owed to him by the federal government, and it is contended that community property laws interfere with the husband's right to choose a beneficiary. However, unlike the insurance program in Wissner in which the right to choose a beneficiary was an integral and explicit part of the federal plan, here we have a designation right constituting no more than a contingency procedure to distribute whatever money, if any, is due to the serviceman but which he failed to collect. We cannot perceive any Congressional intent that the designation right be central to the whole military retirement system or that it foreclose the states from classifying retirement benefits as community property."

More significant, for purposes of those asserting a community property claim under a section 2771 distribution, than the court's classification of retirement pay as community property, is its quoted dicta, wherein the court suggests that the underlying purpose of section 2771 might not warrant disregard of state community property standards to the same extent as the statute under scrutiny in Wissner. See generally Buchser v. Buchser, 231 U.S. 157, 162(1913);

McCune v. Essig, 199 U.S. 382 (1905); Estate of Perryman, supra note 142; Comment, 47 CAL. L. REV., supra note 142, at 380-81.

[144]In Wissner the majority was composed of Justices Clark, Black, Reed, and Burton and Chief Justice Vinson. Justices Frandfurter and Jackson joined Justice Minton in dissenting. Justice Douglas took no part in the decision. When Free was decided, two of the Wissner dissenters, Justices Minton and Jackson, no longer sat as members of the court. The third dissenter, Justice Frankfurter, and the newest member of the Court, Justice White, did not participate in the decision. All other members of the Court in Free acquiesced in the majority decision.

[145]See notes 59-63 supra, and accompanying text.

[146]See note 137 supra.

[147]338 U.S. at 663: "I am not persuaded that either the choice of beneficiary or the exemption provision should carry the implication of wiping out family property rights, which traditionally have been defined by state law. Fully to respect the right which Congress gave the serviceman to designate his beneficiary does not require disrespect of settled family law and the incidents of the family relationship."

[148]Neither Justice Frankfurter, a dissenter in Wissner, nor Justice White participated in the decision.

[149]See note 137 supra.

[150]See note 135 supra.

[151]See note 131 supra.

[152]See note 132 supra.

[153]Wissner, supra note 43, at 660.

[154]Id. at 663, n. 2. [Minton, J. dissenting].

[155]238 Iowa 905, 29 N.W. 2d 597 (1947).

[156]Id. at 922, 29 N.W. 2d at 606

[157]See, e.g., Schlaefer v. Schlaefer, 112 F.2d 177 (D.C. Cir. 1940), involving a similar attempt by a wife to reach federal disability funds to satisfy alimony obligations, wherein the court noted:

> "An important, often the primary, motivation for taking out disability insurance is protection of the family, not merely of its supporter. As has been said, the funds are not earmarked for limited and particular purposes. They are derived normally from the insured's earning power. They constitute a substitute for it when it is gone. By law and the most sacred contract he is obligated to employ it, while it exists, for dependents' support . . . Though he may not be able to work, if he has other means he is required to apply them equitably in the discharge of his duty. . . . An award of alimony or support money may destroy this power by giving her a substitute for it. But it does not destroy, on the contrary it enforces the obligation from which the power is derived." Id. at 185.

[158]338 U.S. at 660.

[159]See, e.g., Hamm v. Piper, 105 N.H. 418, 201 A.2d 125 (1964); Rheinheimer v. Rhedans, 327 S.W. 2d 823 (Mo. 1959); Moore v. Moore, 15 Ill. 2d 239, 154 N.E. 2d 256 (1958); Delaney v. Delaney, 133 N.E. 2d 915 (Ohio App. 1956).

[160]See, e.g., In re Estate of Meyer, 26 Wis. 2d 671, 133 N.W. 2d 322 (1965); Katz v. Katz, 13 Misc. 2d 953, 178 N.Y.S. 2d 795 (1958); Caldwell v. Caldwell, 5 Wis. 2d 146, 92 N.W. 2d 356 (1958).

[161]See generally Butler v. Fitzgerald, 43 Neb. 192, 61 N.W. 640 (1895); Bomar v. Wilkins, 154 S.C. 64, 151 S.E. 110 (1930).

[162]See, e.g., In re Marriage of Higgason, 10 Cal. 3d 476, 485-86, P.2d

110 Cal. Rptr. 897, 899-900 (1973), and cases cited therein.

[163]See note 60 supra.

[164]See note 132, supra.

[165]See text accompanying notes 167-177 infra.

[166]28 U.S.C. sections 2671-80 (1970). See text accompanying notes 178-188 infra.

[167]5 U.S.C. section 5581 (2) 1970).

[168]H.R. Rep. No. 833, 84th Cong., 1st Sess. (1955).

[169]See 37 U.S.C. section 101(21)(1970): "'pay' includes basic pay, special pay, retainer pay, incentive pay, retired pay, and equivalent pay, but does not include allowances." Allowances are outlined in 37 U.S.C. sections 401-424 (1970).

[170]See Rev. Ruling 67-450 (1967).

[171]37 Comp. Gen. 832 (1958).

[172]See 32 C.F.R. section 533.20 (1973).

[173]See Hearing Before the Committee on Armed Services, United States Senate, April 21, 1955 at 19: "The Department of Defense is of the opinion that provisions should be made to grant the uniformed service concerned the authority to make payment of any pay and allowances or other amounts due a service member at date of death to a designated beneficiary."

[174]Act of June 30, 1906.

[175]37 Comp. Gen. at 835.

[176]See note 43 supra.

[177]See 10 U.S.C. section 1035(d) (Supp. I. 1973).

[178]Federal Tort Claims Act, 28 U.S.C. section 2674 (1970)

[179]For military personnel, "scope of employment" is defined as "acting in the line of duty." 28 U.S.C. section 2671. A series of federal cases indicate that this definition does no more than invoke the law of respondeat superior of the respective states. See, e.g., Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966), cert. denied 387 U.S. 917 (1967); Adams v. United States, 302 F. Supp. 1147 (M.D. Pa. 1969); Kimball v. United States, 262 F. Supp. 509 (D. N.J. 1967).

[180]See note 12 supra regarding other post-distribution remedies.

[181]A tort claim can clearly be based on a negligent omission. See, e.g., Ingham v. Eastern Air Lines, Inc., 373 F.2d 227 (2d Cir. 1967), cert. denied 389 U.S. 931 (1967); Allison v. United States, 264 F. Supp. 1021 (E.D. Ill. 1967).

[182]For example, in the Navy, the duty to review and revise service records is imposed by BUPERSMANUAL Section 5030120:

> "Verification of officer and enlisted records shall be accomplished upon transfer of the member and then be policed by the receiving command. The verification shall be conducted in the presence of the member, if feasible upon transfer, and always upon receipt. Records shall also be verified prior to disposal, and in the case of enlisted members when they reenlist on board
>
> . . . .
>
> "Interview each member to assure that the emergency data recorded on Page 2 is current."

[183]340 U.S. 143 (1950).

[184]Derivative actions brought by the spouse of a deceased serviceman have likewise been barred by the doctrine of Feres. Indeed, Feres itself involved a derivative action for the wrongful death of a serviceman by the executrix of

the estate. Accord Henning v. United States, 446 F.2d 774 (3d Cir. 1971), cert. denied 404 U.S. 1016 (1972); United States v. Carroll, 369 F.2d 618 (8th Cir. 1966).

It is conceivable that a wife could bring an action in her husband's behalf by asserting that the injury did not occur until after his death, thereby precluding the operation of Feres. This same theory was asserted in Henning where the wife contended that the serviceman was released from active duty prior to his death from tuberculosis which had gone undetected because of the misreading of x-rays at the time of the discharge physical. In response to this contention, the court noted: "We think that Feres focuses not upon when the injury occurs or when the claims become actionable but rather the time of and the circumstances surrounding the negligent act." 446 F.2d at 777. This same rationale would also arguably apply to a claim arising from a section 2771 distribution.

[185]A primary requirement under the Federal Tort Claims Act is the establishment of a causative link between the negligent act of a government employee and the resulting injury. See, e.g., Tyndall v. United States, 306 F. Supp. 266 (E.D.N.C. 1969), affirmed 430 F. 2d 1180 (Cir. 1970); Mann v. United States, 294 F. Supp. 691 (E.D. Tenn. 1968); Moenck v. United States 264 F. Supp. 615 (N.D. Iowa 1966).

[186]See notes 61 and 62, supra and accompanying text.

[187]See note 63, infra and accompanying text.

[188]See note 64 supra.

[189]See note 22 supra

[190] See note 23 supra.

[191] See note 81 supra for the views of one author lauding this liberalization.

[192] Gulliver and Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1,5-13 (1941)

[193] The remedies suggested in this article do not exhaust the alternatives. Indeed, one remedy not even considered, a private bill before Congress, might ultimately bear greatest fruits.

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This paper deals with legislation controlling distribution of the accumulated military pay of a member of the armed forces upon his death. The author discusses the inequities of the existing legislation and suggests remedies for avoiding the inequitable impact of the federal enactment.

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